Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

James R. King,
Appellant,

vs.

State Board of Elections, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Where the Challenged District was Created by a Prior Court's Decision and the Lower Court Found that the Challenged District was a Race-Based Classification, was the Lower Court Exempt from Applying Strict Scrutiny to the Challenged District?

2. Where a Congressional, Court-Ordered Districting Plan is Found to be Bizarre and Uncouth on the Basis of Race, Can it be Found to be a Narrowly Tailored Remedy under §2 of the Voting Rights Act, Presuming that there was a Violation?

3. Was There a Strong Basis in Evidence for a Federal District Court to uphold a Racial Gerrymander pursuant to the Equal Protection Clause?

LIST OF PARTIES

Plaintiff

James R. King

Defendants

State Board of Elections
David E. Murray
Lawrence E. Johnson
Hannelore Huisman
Judith Jones
Langdon D. Neal
Theresa M. Petrone
Wanda Rednour

Defendant Intervenors

Bobby Rush
Timuel Black
Al Johnson
Elvira Carrizales
Neomi Hernandez
The Chicago Urban League

United States

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BASIS OF JURISDICTION

The District Court for the Northern District of Illinois entered the Order in this cause on March 13, 1996, denying the Plaintiffs request for temporary and permanent injunctive relief. The Plaintiff files this appeal pursuant to 28 U.S.C. Sec. 1253, Direct Appeals from Decisions of Three-Judge Courts. Plaintiff's Notice of Appeal was filed on March 22, 1996. Notice of Appeal, Appendix, 1.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The United States Constitution provides at Article III, Section 2 that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...; [and] to Controversies . . . ."

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.". The relevant statutory provision is section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Sec. 1973, the pertinent parts of which are reproduced at Appendix, 72.

Illinois State Statutory law on Precincts, Illinois Compiled Statutes, 735 ILCS Ch. 5/11-2, et seq., is reproduced at Appendix, 74.

STATEMENT OF THE CASE

A. Prior Congressional Redistricting: *Hastert et al. v. State Board of Elections.*

1. History

The current congressional districting map, upheld in the instant case by the lower court, was, in 1991, court-ordered and approved by the United States District Court for the Northern District of Illinois, Eastern Division in 1991 in the decision of *Hastert et al. v. State Board of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991). At the time that *Hastert* was initiated, the recently released 1990 census data indicated that the State of Illinois was to lose two congressional seats due to a comparative decline in population growth. *Id.* at 638. The Illinois legislature was charged with implementing a

congressional districting plan by June 30, 1990. *Id.* at 638. It failed to do so, and various Democratic and Republican party members initiated the *Hastert* action for congressional redistricting due to the population changes. Shortly thereafter, a group of Hispanic and African-American voters filed an action which, in addition to seeking relief relating to population changes, sought the creation of an Hispanic majority congressional district under §2 of the Voting Rights Act. *Id.* The cases were consolidated along with other plaintiffs who were seeking relief from the 1981 congressional districting plan. *Id.*

Throughout the proceedings, all the parties to the *Hastert* litigation agreed that the "population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district." *Id.* at 640. The *Hastert* court also said that "[i]ndeed, an agreement on this issue [the creation of an Hispanic majority district] may be the crucial factor in facilitating the creation of an Hispanic district." *Id.* Consequently, the district court in *Hastert* approved the Hispanic portion of the congressional map, relying upon the requirements for making out a Section 2 violation under the Voting Rights Act pursuant to *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986).

2. *Findings of Fact of the* Hastert *court.*

The *Hastert* court found that under the three prerequisites of *Gingles* that the Hispanic District was required in order to avoid a violation under §2 of the Voting Rights Act. The court found, first, that the Hispanic majority within the district was "sufficiently numerous and geographically compact." The court based its findings upon the following evidence:

> (1) "the Hispanic population of Chicago now totals 545,852, and increase of 29.33% over the 1980 count of 422,052."
>
> (2) "Most of the Chicago/Cook County Hispanic population is clustered into two dense enclaves, one on Chicago's near northwest side and another on the near southwest side."
>
> (3) "The two separate Hispanic population clusters are less than a mile from each other at their closest points."
>
> (4) "The separation of the clusters is not indicative of the

existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers."

Id. at 649.

The *Hastert* court also found under the second prong of *Gingles* that the Chicago/Cook County Hispanic community is politically cohesive. The court based this finding upon:

(1) "previous adjudications that found the community politically cohesive and which are themselves evidence of a community acting as one to defend against politically discriminatory practices at both the state and local level. *See, Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984)(1982 Chicago aldermanic redistricting plan violates Hispanic rights under Voting Rights Act), *on remand*, 630 F.Supp. 551 (N.D.Ill.1985); *Rybicki v. State Board of Elections*, 574 F.Supp.1082 (N.D.Ill.1982) (three judge panel) (approving Voting Rights Act settlement with Hispanic community regarding 1982 state legislative redistricting)."

(2) "the bloc voting patterns of the community. Single and bivariate regression analysis of voting patterns in Chicago precincts demonstrate significant ethnic bloc voting patterns."

Id. at 650.

Under the third prong of *Gingles*, the court in *Hastert* found that "ethnic bloc voting patterns have thwarted the political interests of the Hispanic community." *Id.* at 650. The court based this upon evidence of "significant ethnic bloc voting patterns", as referred to above, in addition to evidence that "[p]revious judicial findings demonstrating a paucity of Hispanic officials in city and state-wide elected political offices, *see Ketchum*, 740 F.2d at 1406, ..." *Id.* at 650.

The *Hastert* court, upon finding that the proponents of the Hispanic district met the threshold requirements of *Gingles*, also found that they met the requirements under the "totality of the circumstances" test. The *Hastert* court again relied heavily upon *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984) for evidence of the totality of the circumstances factors. In *Hastert* the findings relied upon were:

(1) "the ward map drawn for the Chicago City Council in 1982 impermissibly fractured the Hispanic community and thus diluted Hispanic voting strength";
(2) the "history of discrimination against Chicago Hispanics in housing, education and services, which the court regarded as a cause of historically low Hispanic voter registration and turnout. [Ketchum] 740 F.2d at 1405";
(3) "absence of any Hispanic representatives on the Chicago City Council from 1920 to 1980. Id. at 1406" and
(4) "the Hispanic population also has been adjudged the victim of intentional discrimination in the drawing of certain state legislative districts following the 1980 census. Id.; see also Rybicki v. State Board of Elections, 574 F.Supp. 1082 (N.D.Ill.1982)."

Id. at 650. None of these courts, including *Hastert* and *King*, make a particularized finding of discrimination against Chicago-area Hispanics apart from the failure to prepare election materials in Spanish in 1972. *See, Ketchum*, at 1406. Seediscussion, *infra* at 24.

B. Lower Court's Decision.

The Plaintiff, James R. King, a resident of the Fourth Congressional District ("4th CD"), brought an equal protection challenge in February, 1995. The lower court, two of whose justices presided over the *Hastert* trial, found that the district was bizarre and, in light of the demographics and evidence in *Hastert*, that the court's strict scrutiny would apply. Despite these findings, however, it held that the Plaintiff failed to establish a violation of the Equal Protection clause because he failed to show abuse of discretion by the *Hastert* court when it adopted the present districting plan pursuant to *Thornburg v. Gingles:*

> There is no evidence that the *Hastert* court abused its discretion. . . . [t]his court defers to the *Hastert* court's balancing of these concerns [under *Gingles*] and concludes that it adopted a narrowly tailored plan.

Opinion at 68-69. The lower court adopted this standard of review in light of its deference to the decision of *Hastert*. King objected to this burden being imposed upon him.

The lower court also found that, in respect to the conclusions of law, that the "law of the case doctrine" would apply. Opinion,

Appendix, 17. The Plaintiff again objected to this burden being placed upon him. See, Plaintiff's Pre-Trial Briefs, Appendix, 104, 110.

ARGUMENT

1. Where the Challenged District was Created by a Prior Court's Decision and the Lower Court Found that the Challenged District was a Race-Based Classification, was the Lower Court Exempt from Applying Strict Scrutiny to the Challenged District?

A. The Lower Court Erred in Applying Strict Scrutiny to the Decision of Hastert, not to the Congressional Districting Plan itself.

The lower court properly determined that strict scrutiny should apply; it improperly deferred to the decision of *Hastert*, and consequently failed to apply strict scrutiny to the Fourth Congressional District itself. The lower court, without authority, assumes undue deference towards the *Hastert* decision which has the effect of shielding the challenged district from strict scrutiny:

> This court['s] . . . task is to determine whether a *court-ordered* reapportionment plan is narrowly tailored. As such, it must defer to *Hastert* court's discretion in selecting an appropriate remedy. . . . There is no evidence that the *Hastert* court abused its discretion. Prior to adopting a remedial plan, the court subjected the proposed plans to an exacting constitutional review and determined which plan would provide a better, more complete remedy for the Section 2 violation. . . . Under these circumstances, this court defers to the *Hastert* court's balancing of these concerns and concludes that it adopted a narrowly tailored plan.

Opinion, Appendix, 69 (citations omitted). The court did not apply strict scrutiny to the 4th CD independent of the factual findings and legal conclusions made in *Hastert*.

B. The Lower Court Committed Error in Holding the Plaintiff to an Improper Standard of Review of the Facts and Law.

Further, the lower court imposed a standard of review equivalent to a modification of an order under Federal Rule 60(b):

> Since King's lawsuit is at its very core a challenge to the *Hastert* court's order, this court concluded that King's lack of standing under Rule 60(b) should not determine the standard of review applicable to the *Hastert* court's findings of fact. The court therefore adopted the standards that *would have applied had King sought to modify the Hastert order under Rule 60(b)*. The court also conditionally admitted the Hastert court's findings of fact to promote important interests in finality and judicial economy. . . . To demonstrate that the *Hastert* court erred in making a specific finding of fact, King has to establish that the court committed clear error. *See Fed. R. Civ. P. 52(a)*

Opinion, Appendix, 17 (footnotes omitted) (emphasis added). In footnote 15 the lower court says that it modified the standard:

> This court has slightly modified the standards to comport to the procedural posture of this case, (i.e. King has filed an independent lawsuit rather than a Rule 60(b) motion to vacate or modify the *Hastert* judgment). Accordingly, this court will consider the *Hastert* court's findings of fact conclusive unless King establishes that the *Hastert* court committed clear error in making specific findings of fact or proves by a preponderance of the evidence that the factual circumstances have changed since the issuance of the *Hastert* decision.

Opinion, Appendix, 17, n.15.

Rule 60(b) permits parties to collaterally attack a judgment of the court for a limited set of reasons. The imposition of the standard of clear error, and it concomitant "abuse of discretion" standard are consistent with Rule 60(b) so as to preserve the finality of judgments. Rule 60(b), however, presumes that the person attacking the judgment was a party to the prior proceeding. King was not a party to the prior proceeding of *Hastert*. In the *King* case, therefore, the court makes the false assumption that King is a person collaterally attacking the judgment in *Hastert*. *See*, *Fabricus v. Freeman*, 466 F.2d 689,

693 (7th Cir. 1972) ("Privity is not established by showing that the prior decision involves the same issues of law or fact and will affect the subsequent litigant's rights as judicial precedent")(citation omitted). The lower court did not give the Plaintiff the opportunity to prove, by a preponderance of the evidence, along with the evidence that was admissible from *Hastert*, that the 4th CD was unconstitutional.

1. King's Claim was not an Impermissible Collateral Attack upon the Hastert *Decision.*

Where a person was not a party to a lawsuit, and subsequently files a lawsuit challenging the judgment rendered in that lawsuit, it does not constitute an "impermissible collateral attack" of the prior judgment. *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, *reh.den.* 110 S.Ct. 11 (1989). In *Wilks*, similar to the present litigation, a prior judgment was challenged in a subsequent lawsuit by persons who were not parties to that judgment. *See, Wilks*, at 759-60, S.Ct. at 2183. In rejecting the idea of "impermissible collateral attack" this Court said:

> All agree that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." . . . This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4449 p.417 (1981).

Id. at 761, S.Ct. at 2184 (emphasis added). In the instant case, the Plaintiff is challenging the configuration of the 4th CD as approved in *Hastert*. The Plaintiff, James R. King, filed an independent action, separate and apart from *Hastert*, over three years after that decision was rendered, challenging the 4th CD both on constitutional grounds as well as grounds covered by the *Hastert* court. Indeed, challenging reapportionment schemes under the civil rights laws may be exempt from the rules regarding issue preclusion. "This court has thus been unwilling to bar subsequent challenges to reapportionment schemes, seemingly constitutional when instituted by the court, but apparently inadequate under the rapidly changing jurisprudence of this area."

Jackson v. DeSoto Parish School Bd., 585 F.2d 726, 729 (5th Cir. 1978).

2. *Where There is No Collateral Estoppel, Findings of Fact Are Not Binding*

The standard of review under 60(b) bound the Plaintiff to the factual findings of *Hastert*. Certainly, this was the intent of the court, insofar as it held that in respect to the Plaintiff meeting his burden of proof on the issue of narrow tailoring, that

> [t]here is no evidence that the *Hastert* court abused its discretion. . . . [t]his court defers to the *Hastert* court's balancing of these concerns [under *Gingles*] and concludes that it adopted a narrowly tailored plan.

Opinion, Appendix, 69-70. In order to be bound by factual findings of a prior proceeding, however, collateral estoppel must be found to apply, and where one was not a party, or is not in privity with a party, those factual findings will not be binding. *Holloway v. A.L. Lockhart*, 813 F.2d 874 (8th Cir. 1987), *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985); *accord, Jackson v. DeSoto Parish School Bd., supra*; *see, Martin v. Wilks, supra* at 761, S.Ct. at 2184 ("A judgment or decree among parties to a lawsuit *resolves issues among them*, but it does not conclude the rights of strangers to those proceedings") (emphasis added), *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1410 (9th Cir. 1990) ("As a general matter, only persons who were parties to the prior action may be bound by *the findings* and conclusions of that action") (emphasis added), *and*, 18 *Wright, Miller, & Cooper* §4449 (1981) ("The rule that nonparties cannot be bound by a judgment ordinarily means that the judgment is not even admissible as evidence of the facts found. At the same time, the judgment carries the ordinary precedential weight of stare decisis"); *see, also, Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117 (1940).

In the *King* case, the lower court expressly acknowledged that the Hispanic 4th CD was created by agreement, citing several passages from the *Hastert* decision to that effect. Opinion, Appendix 22-23. In addition, however, in order for the lower court to apply some equivalent of collateral estoppel, the factual issue must be "actually litigated". *See, Prymer v. Ogden*, 29 F.3d 1208, 1212 (7th Cir. 1994). Moreover, "[a] fact established in prior litigation not by judicial resolution, but by stipulation has not been `actually litigated' and

thus is the proper subject of proof in subsequent proceedings." *United States v. Young*, 804 F.2d 116, 118 (8th Cir. 1986), *Otherson v. Department of Justice, I.N.S.*, 711 F.2d 267, 274 (D.C. Cir. 1983); *see, also, United States v. International Bldg. Co.*, 345 U.S. 502, 504-505, 73 S.Ct. 807, 808-809 (1953).

The lower court asserted at footnote 16 that

> [t]he concepts of finality and judicial economy provide a very pragmatic foundation for the standard of review adopted by this court. Since King has brought this lawsuit in his individual capacity rather than on behalf of a certified class, this court's findings of fact would not bind other potential private litigants who are not in privity with King. It is therefore conceivable that these other potential litigants, displeased by this court's ruling, might separately file a series of lawsuits challenging the constitutionality of the Fourth Congressional District.

Opinion, Appendix, 17, n.16. Judicial economy, as a basis for denying a party his day in court, was rejected by this Court in *Martin v. Wilks*, saying that acceptance of this argument

> would require a rewriting rather than an interpretation of the relevant Rules. . . . [W]e are not persuaded that [its] acceptance would lead to a more satisfactory method of handling cases like these. It must be remembered that the alternatives are a duty to intervene based on knowledge, on the one hand, and some form of joinder, as the Rules presently provide, on the other.

Id. at 767, S.Ct. at 2187. This Court also noted that the difficulties from cases in which a party may subsequently challenge it "arise from the nature of the relief sought. . . ." *Id.* Further, where an issue has not actually been litigated, it is also true that

> [t]he interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

Restatement of the Law (Second), Judgments, §27 comment e. Thus, the court's concern about judicial economy is without basis where the parties in *Hastert* were in agreement on the creation and form of a Hispanic congressional district.

Similar to the court's imposition of the "abuse of discretion" standard in respect to the facts, the court's imposition of the "law of the case" doctrine was also improper for the same reason: King was not a Plaintiff in the *Hastert* case. A party cannot be bound by a prior judgment unless that party has been found to have been a party in the prior case. *See, Martin v. Wilks, supra.*

The proper role for the decision of *Hastert* was that of *stare decisis*, and nothing more. *See, Litchfield v. Crane*, 123 U.S. 549 (1887) ("the [prior] could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive of her rights"), *Bissonette v. Haig*, 776 F.2d 1384, 1390 (8th Cir. 1985) ("[our previous decision] does, however, stand as a binding precedent in this Circuit on the interpretation of the Act"); *Cf., Bowman v. City of Franklin*, 980 F.2d 1104, 1107 (7th Cir. 1992) (Fed.R.App.P. 28(j) and Circuit Rule 28(j) prohibit supplementing with evidence, but not legal authority). *Hastert* has very little *stare decisis* effect upon the claim of King because *Shaw v. Reno* has changed the extent to which race may be used to construct remedial districts under the Voting Rights Act.[1]

C. Court Erred in Failing to Shift the Burden of Production to the Defendants and Defendant-Intervenors.

"To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller v. Johnson*, 515 U.S. ___, 115 S.Ct. 2475, 2490 (1995) (citations omitted). The Defendants and Defendant-Intervenors were not required at trial to demonstrate that the 4th CD was narrowly tailored. Despite the lower court's comments on the shifting of the burden (see, Opinion, Appendix, 37 n.36), the lower court makes no mention of the Defendants or

---

1 The lower court says that it found that the *Hastert* court did not consider the issue of whether the use of race was impermissible nor did it consider the issue of compactness. See, Opinion, Appendix 49 (use of race), and 52, n.48 (compactness).

Defendant-Intervenors meeting its burden of production, or otherwise, on narrow tailoring. See, Opinion, Appendix, 61-65. Instead, it imposed the burden of production on Plaintiff. Certainly, where the lower court also applied the equivalent of Rule 60(b) to the facts proven, as discussed, *supra*, the lower court increased the difficulty of the Plaintiff's burden to prove that the 4th CD was not narrowly tailored. Furthermore, this Court has made clear that a Federal Court is under a higher, not lower, standard of review in drafting reapportionment plans. *Wise v. Lipscomb*, 437 U.S. 535, 98 S.Ct. 2493 (1978). *See, Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834; *see, also, Upham v. Seamon*, 456 U.S. 37, 42, 102 S.Ct. 1518, 1521 (1982).

D. Judicial Notice of Facts In Hastert Case.

In distinction to the evidence submitted in *Hastert*, the lower court ordered that the its findings of fact were admitted. According to Federal Rule of Evidence 201, judicial notice is for "facts that are generally known within the territory of the court's jurisdiction or are capable of accurate and ready determination from a source whose accuracy is beyond reasonable doubt." Fed.R.Ev. 201, Appendix 73. *See also, Bissonette v. Haig, supra* at 878-79. Review of the cases cited by the court indicates that it did not distinguish those cases where the party in question was not a party in the prior lawsuit. *See, Philips Medical Sys. Int'l, B.V. v. Bruetman*, 982 F.2d 211 (7th Cir. 1992), *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364 (7th Cir.), *cert. denied* 461 U.S. 960, 103 S.Ct. 2436 (1983) (same). Taking judicial notice of the findings of fact of the *Hastert* case, in addition to the lower court's imposition of the equivalent of Rule 60(b) and its failure to properly consider the burden of production imposed upon the Defendants and Defendant-Intervenors by reason of strict scrutiny, all made it exponentially more difficult for the Plaintiff to meet his burden in this case.

2. Where a Congressional, Court-Ordered Districting Plan is Found to be Bizarre and Uncouth on the Basis of Race, Can it be Found to be a Narrowly Tailored Remedy under §2 of the Voting Rights Act, Presuming that there was a Violation?

In the instant case, the lower court found that

> the only reasonable conclusion that can be drawn from the shape and demographics of the district is that racial considerations predominated over all other factors in the configuration of the Fourth Congressional District.

Opinion, Appendix, 50. The district court also found that the Fourth Congressional District was not compact,[2] and was bizarre and uncouth.[3] Opinion, Appendix, 51 n.48. At the same time, however, the district court concluded that the district was narrowly tailored by the *Hastert* court, despite saying that it would apply strict scrutiny. Opinion, Appendix, 69-70.

The findings by the district court, in conjunction with this Court's opinions in the recently decided cases of *Bush v. Vera*, ___ U.S. ___, ___ S.Ct. ___, (1996 WL 315857) and *Shaw v. Hunt*, ___ U.S.

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2 Despite the district court saying that "[t]he finding of geographic compactness to satisfy a *Gingles* threshold factor thus does correspond to a separate finding that the Fourth Congressional District was also compact" at note 48, no such explicit finding was made. The court said that pursuant to state law, the Fourth Congressional District is not "visually compact", citing *Schrage v. State Bd. of Elections*, 88 Ill.2d 87, 98, 430 N.E.2d 483, 487 (1981), and that it was not "functionally compact", "unless the court completely discounts the 4.7% of the district's population dispersed throughout the western connector. . . ." Opinion, Appendix, 51, n. 48.

3 Bizarreness of the Fourth Congressional District was also a finding of the *Hastert* court:

> Justice Stevens, in his concurring opinion in *Karcher v. Dagget*, 462 U.S. at 744-65, took aim at the 'bizarre configuration' of New Jersy's 1982 congressional reapportionment plan. We would be remiss if we failed to observe that the proposed Hispanic district agreed to by all parties in the present action makes the 'bizarre' configuration of the *Karcher* congressional district acceptable by comparison. . . . In sum, the district looks not unlike a Rorschach blot turned on its side. Few districts have quite so an extraordinary appearance. *See, generally* Congressional District Atlas: 100th Congress of the United States, United States Department of Commerce Bureau of the Census (1985).

Hastert v. State Bd. of Elections, 777 F.Supp. 634, 648 n.24 (N.D. Ill. 1991).

___, ___ S.Ct. ___ (1996 WL 315870) (*Shaw II*), admit of only one conclusion: the 4th Congressional District is not narrowly tailored because its bizarreness and uncompactness are attributable to race. In *Bush v. Vera, supra*, this Court found that districts which are "bizarre" and "far from compact" are not "narrowly tailored to serve the State's interest in avoiding liability under §2, because §2 does not require a State to create, on predominantly racial lines, a district that is not `reasonably compact'" *Id.*, at ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315857) (citing *Johnson v. DeGrandy*, 512 U.S. ___, 114 S.Ct. 2647 (1994); *see, also, Bush v. Vera* ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315857) (O'Connor concurring) ("districts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for predominantly racial reasons, are unconstitutional"). Review of the district map shows that there are three aspects to its shape: (1) the "raggedness" of the edges, due to drawing the district at the census block level; (2) what the district court has referred to as the "promontory" or "appendages" on the northernmost and southernmost sides of the district; and, (3) what the court has referred to as the "western connector". See, 4th CD Map, Attachment.

A. "Raggedness" of the Boundary

The district court found that the lines of the Fourth Congressional District follow concentrations of the Hispanic population with "exquisite" detail. Opinion, Appendix, 53. The district court said that the census block data "permitted the map makers to draw the district's boundaries on a block-by-block basis in order to maximize the concentration of Hispanics in the district." Opinion, Appendix, 53-54. The Plaintiff's expert testified to the "raggedness" of the borders, resulting from this exquisite map drawing. See, Cleveland Test., Appendix, 81. These irregularities also created difficulties in campaigning. Torres Test., Appendix 89.

B. The Northern & Southern "Appendages".

The district court found that the two "appendages" or "promontory" points of the 4th CD were drawn on the basis of racial considerations, relying upon the *Hastert* court's statement that

> "To ensure a sufficient Hispanic concentration within the proposed district, both maps shoot rays out from the northwest and southwest enclaves *to capture additional Hispanic population.*"

Opinion, p. 52. (emphasis in original). See 4th CD Map, Attachment.

C. The "Western Connector"

The district court found that "unless the court completely discounts the 4.7% of the district's population dispersed throughout the western connector, the district is not functionally compact . . . ." Opinion, Appendix, 52, n.48.[4] Further, the lower court found that "portions" of the "western connector" were explainable only on racial grounds.[5] The lower court found that

> "the portion of Stickney township included in the Fourth Congressional District is 81.6% Hispanic and only 14.5% white while the portion of the township allocated to the Third Congressional District is 5.5% Hispanic and 93.2% white. Similarly, in Proviso Township, 57% of the township population included in the Fourth Congressional District is Hispanic and 36.6% is white while the portion of the township included in the Third Congressional District is 4.9% Hispanic and 79.3% white.

Opinion, Appendix, 54-55.[6] Indeed, those portions of the "connector" which contain population, and not vacant park land, cemeteries, or

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4 See, also, the lower court's comment that within a hypothetical rectangle, "neither the western connector nor the two promontory points jutting out of the district's two core areas fall inside this rectangle." Opinion, Appendix, 52 n.48.

5 The creation of a "connector" of any sort is an act, in itself, that is racially motivated if the objective is to create a majority-minority district, especially here, where the area it encircles is a majority African-American, the 7th Congressional District. *See, Hastert*, at 650. Political manipulation may have been at work, as it is in all districting, but it was not enough for the court to have found that the district was not created on the basis of race.

6 The district court also noted that this connector contains a "significant amount of vacant land, park land, cemeteries and industrial areas . . . to ensure the district's contiguity" which makes it "'hypertechnical[] and . . . cynical'" Opinion, Appendix, 53 n.49, (citing *Hays v. State of Louisiana*, 839 F.Supp. 1188, 1200 (W.D. La. 1993).

industrial land, were drawn on the basis of race. See, Cleveland Test., Appendix, 82; Hispanic Population in Townships in Western Connector, Appendix, 83.

Dr. Taylor, an expert for the Defendant-Intervenors in both the instant case and in *Hastert*, testified in *Hastert* that the "western connector", based upon his review of the change of neighborhoods, would increase in Hispanic population, indicating that the "western connector" was designed to continue to increase Hispanic population. Taylor Test. (*Hastert*), Appendix, 84. In addition, Orestes Aguillon stated in his affidavit, submitted in *Hastert* and part of the record in the instant case, that he made adjustments to the Hispanic map "in order to increase the percentage of the Hispanic population in the Hispanic district." Aguillon Affidavit, Appendix, 85, ¶8. Review of the map suggests that the areas in which there are population, the mapmakers in *Hastert* consistently sought out Hispanic population to create the "connector". The "connector" creates greater uncompactness than either the "raggedness" or "appendages" and, thus, dramatically contradicts the lower court's finding that the 4th CD was narrowly tailored by the *Hastert* court.

D. Violation of Traditional Districting Principles: Splitting of Political Subdivisions.

The lower court found that the 4th Congressional District split a number of political subdivisions: eight (8) townships, eighteen (18) municipalities, including the City of Chicago, twenty (20) aldermanic wards and 218 voting precincts. Opinion, Appendix 54-55. Plaintiff's testimony in the case showed that approximately 21% of the population of the 4th CD lived in a split precincts after the creation of the 4th CD. Population in Split Precincts, Appendix, 88.

In the 4th CD, the splitting of the precincts is particularly telling of the violation of traditional districting principles. Illinois law provides that in Chicago, the election precincts are to "contain nearly as practicable 600 voters". Illinois Compiled Statutes Ch. 10, Sec. 5/11-3 (West 1994). In Cook County, the area surrounding Chicago, the county board is to "divide its election precincts into "election districts so that each shall contain, as near as may be practicable, 500 voters." *Id.* at 5/11-2. The statute provides that when a

legislature creates congressional districts,

> in order to situate each precinct within a single district or ward, the County Board shall change the boundaries of election precincts after each decennial census as soon as is practicable following the completion of congressional and legislative redistricting.

Id. The statute regarding Chicago provides the same. *Id.* at 5/11-3. The statute shows that there is a traditional districting policy that a certain number of persons ought to be maintained within a precinct. But precincts within the "western connector" were split to such low population levels, that the ballot secrecy of at least three Cook County voters was compromised in the 1994 general election for U.S. Representative for the 4th Congressional District. Illinois law provides that voters are entitled to a secret ballot. Illinois Compiled Statutes, Ch. 735, Sec. 5/8-910 (West 1994). These voters whose ballot secrecy was likely compromised, two of whom were in Stickney precinct 40, and one in Proviso precinct 132, can likely be identified by matching the poll books to the canvass of election results. Lewis Test., Appendix, 90; Selected Precinct Election Results, Appendix, 91.

E. Failure to Justify the Rejection of Alternative Remedies.

Before a court can find that a race-based classification is narrowly tailored, it must first consider whether a more race-neutral alternative is available. *City of Richmond v. Croson*, 488 U.S. 469, 109 S.Ct. 706, 729 (1989) citing *U.S. v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 1066 (1987).[7] The record in *Hastert* indicates that maps were submitted by the Hispanic plaintiffs showing that connectors were available on both the eastern and middle sections of the district, without affecting the numerousness of the Hispanic population necessary to constitute a district. Aguillon Affidavit,

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7 No standard for reviewing alternatives has been adopted by this court; however, the precepts of narrow tailoring itself indicate that the remedy applied shall be "reasonably necessary" to accomplish the objective of the law. *See, Shaw v. Hunt*, ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315870) (strong basis in evidence . . . for concluding that creation of a majority-minority district is *reasonably necessary* to comply with §2. . . .") (emphasis added, citations omitted) *and, Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 481 106 S.Ct. 3019, 3052-53 (Powell, J., concurring).

Appendix, 85, ¶¶7,8; Maps from Aguillon Affidavit, Attachments. The *Hastert* court did not evaluate these districts. *See, Hastert, supra.* Nor did the lower court consider this evidence when it found that the 4th CD was narrowly tailored.

In addition, an alternative was suggested by the lower court, which further indicates that the 4th Congressional District was not narrowly tailored. Consistent with the observation that there may be a divergence between the affected population and the remedy[8] and presuming that the entire population in the 4th Congressional District

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Footnote 7, con't.

It has been suggested that review and explanation of rejecting other remedies is necessary to conclude that a particular remedy satisfies strict scrutiny. *See, U.S. v. Paradise*, at 200, S.Ct. at 1082 (O'CONNOR dissenting) ("Without any explanation of the available alternatives in the instant case, no such evaluation [whether the claim that the racial quota was necessary] is possible"). Certainly, one factor in evaluating the alternative remedy is to protect the non-minorities. *See, U.S. v. Paradise, supra*, at 199, S.Ct. at 1081 (O'CONNOR dissenting) ("protection of the rights of nonminority workers demands that a racial goal not substantially exceed the percentage of minority group members in the relevant population or work force absent compelling justification.")

8 The lower court asserts that

> "[t]he question raised by *Gingles* is whether the minority population (and not the district drawn to accommodate that population) is geographically compact and sufficiently numerous to constitute a majority in a single member district. This measure of geographical compactness thus concerns whether a Section 2 violation has occurred; the second measure of compactness (*i.e.*, as a traditional race-neutral districting principle) concerns whether the district drawn to remedy the Section 2 violation satisfies the requirements of the Equal Protection Clause. To conflate the two into a single measurement confuses the liability with the damages analysis, and represents an unwarranted extension of *Shaw*."

Opinion, Appendix 64. Indeed, the divergence between the affected population under §2 and the remedial district is a distinction that this Court made in *Shaw v. Hunt*, ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315870). In *Shaw v. Hunt* this Court said that where a remedial district is drawn and it only addresses 20% of the population which has been deemed to have been entitled to a remedy, that percentage is not enough to be considered to have "substantially addressed the §2 violation", leaving open the possibility that a remedial district need not entirely coincide with

is the group entitled to remedy? the district court found that

> a fairly small rectangle can be drawn around the two enclaves on the near northwest and near southwest sides of the city that would include a substantial majority of the Hispanic community's geographic compactness. The Fourth Congressional District, however, would not fit within the area of this same rectangle: neither the western connector nor the two promontory points jutting out of the district's two core areas fall inside this rectangle.

Opinion, Appendix, 52 n.48.

The lower court's assertion that such a hypothetical district exists is further evidence that the *Hastert* court failed to consider another alternative remedy. The failure of the *Hastert* court and the lower court to properly review less irregular remedies points out lack of narrow tailoring by the *Hastert* court and the failure of the lower court to properly apply strict scrutiny.

Footnote 8, con't.

the affected population. *Id.* at ___, S.Ct. at ___. This analysis by the Court in *Shaw II* would only follow upon a finding, however, that there is a geographically compact minority; as where "there neither has been a wrong nor can be a remedy". *Id.* at ___, S.Ct. at ___.

9 The Defendant and Defendant-Intervenors have never introduced evidence that the Hispanics outside the main area of the district in the "connector" were ever subject to violation of §2. If any violation of §2 existed, it was for only those Hispanics in the City of Chicago.

3. Was There a Strong Basis in Evidence for a Federal District Court to Uphold a Racial Gerrymander pursuant to the Equal Protection Clause?

A. "Strong Basis in Evidence" Requires that a Court Find that There Has Been a Violation of Federal Law Before Engaging in Remedial Districting under §2 of the Voting Rights Act.

The Court has recognized the inherent difficulties surrounding the creation of race-based districts when the Court said that "appearances do matter" and race based districting

> reinforces the perception that members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible stereotypes. . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

Id. at 2827. (citations omitted); *see, also, Shaw II*, at ___, S.Ct. at ___ ("Significant deviations from traditional districting principles, . . . cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial.")

Consequently, this Court said, in both *Vera* and *Shaw II*, that in order for a race-based districting plan to meet the judiciary's narrow tailoring requirement, the State must present a strong basis in evidence before a court may uphold a race-based district. *See, also Shaw v. Reno*, 509 U.S. 630, 656, 113 S.Ct. 2816, 2832 (1993). In *Bush v. Vera* this Court said

> The State must have a 'strong basis in evidence' for finding that the threshold conditions for §2 liability are present
>
> "first, that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single member district; second, `that it is politically cohesive'; and third `that the white majority votes sufficiently as a

> bloc to enable it . . . usually to defeat the minority's preferred candidate."

Id. at ___, S.Ct. at ___.

A Federal court's obligation to find a "strong basis in evidence," however, is beyond that of a State, insofar as a Federal court must first find that there is a violation of §2. In *Voinivich v. Quilter*, this Court said

> [F]ederal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. . . . Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts to conduct apportionment in the first place.

Voinivich v. Quilter, 507 U.S. 146, 156, 113 S.Ct. 1149, 1156 (1993) *See, also, Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075 (1993), *Upham v. Seamon*, 456 U.S. 37, 43, 102 S.Ct. 1518, 1522 (1982) (The limits placed upon a federal court in districting "do not come into play until and unless a remedy is required. . . ."). This same limit is not placed upon the States, which need not find a violation of federal law in order to create §2 districts. *Voinivich*, at 156, S.Ct. at 1156. The reason for this flexibility is suggested by this Court in *Voinivich* which said that "'[s]tates do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law.'" *Id.* (citation omitted). *See also, Missouri v. Jenkins*, ___ U.S. ___, ___, 115 S.Ct. 2038, 2061 (1995) (O'Connor, J., concurring) ("Courts . . . are different. The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe pallatives for societal ills. The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation. . . .") *and, Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 362 (1992), *cert. denied* ___ U.S. ___, 113 S.Ct. 2334 (1993) ("Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process.")

Regarding a violation, the Voting Rights Act itself states:

> A *violation* of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class citizens protected by subsection (a). . . .

Voting Rights Act, 42 U.S.C. §1973, Sec. 2(b) (1994), Appendix, 72. In *Gingles* this Court stated "the critical question in a §2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process." *Id.* at 63, 106 S.Ct. at 2773. *See, also, Id.* at 44, 106 S.Ct. 2763.

A violation under the Voting Rights Act is vote dilution. "Redistricting had been used to dilute minority voting power by spreading minority voters throughout different districts or packing minority voters into a single district. . . . It is this problem the Voting Rights Act sought to remedy." *DeWitt v. Wilson*, 856 F.Supp. 1409 (1994), *affirmed*, ____ U.S. ___, ___ S.Ct.____, citing *Shaw v. Reno*, ___ U.S. at ____, 113 S.Ct., at 2823. *See, also, Gingles* at 478 U.S. 30, 46 n.11, 106 S.Ct. 2752, 2764, n.11.

In the instant case, the lower court never reviewed whether a violation existed for which the Hispanics in the City of Chicago, and much less outside of Chicago, were entitled to a §2 remedial district. Nowhere has the lower court cited fragmenting or packing in prior congressional districting plans against Hispanics; indeed, it was never asserted, either in *Hastert* or in the instant case, that Hispanics had the required population prior to 1990. See, Hispanic Population Change 1980-1990, Appendix, 103. Further, the 1981 congressional plan was challenged in *Hastert* primarily because it was malapportioned in light of the results of the 1990 census. *Hastert* at 638.

The lower court recognized that there was no violation to be remedied when it said

> [t]he *Hastert* court therefore set forth to determine which proposed plan *better satisfied* the governing constitutional requirements of population equality, fairness to minority

voting rights (i.e vote dilution), and political fairness . . . .

Opinion, Appendix, 25 (emphasis added). This infers that either plan, both of which contained an Hispanic district in a C-shaped configuration with a western corridor (*See, Hastert*, at 648, n.24), would satisfy constitutional requirements.

The lower court said that *Hastert* addressed a potential violation insofar as the *Hastert* court evaluated the plans submitted by the parties at the time, not by evaluating past violations of §2:

> This inquiry required the [*Hastert*] court to assess whether either of the proposed redistricting plans had the discriminatory effect of diluting the power of minority votes.

Opinion, Appendix, 25. The proof relied upon by the *Hastert* court and cited by the lower court, discussed *infra* at 23, relates to a review of a §2 claim under the "totality of the circumstances", but does not establish that there was a violation itself. *See, Gingles*, at 36-37, 45, 106 S.Ct. 2759, 2763 (totality of the circumstances factors are "probative" and "neither comprehensive nor exclusive"). Therefore, the lower court's assertion that "the *Hastert* court adopted the Fourth Congressional District to remedy a proven Section 2 violation" is clear error. Opinion, Appendix, 68; see, also, Opinion, Appendix, 24.

This Court has suggested in its recent rulings that the Federal judiciary may not engage in creating remedial §2 districts where no violation has been shown. In *Bush v. Vera* the Court said

> [u]nder our cases, the States retain a flexibility that federal courts enforcing §2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is to their reasonable fears of, and to their reasonable efforts to avoid, §2 liability.

Id. at p.13. Thus, in the instant case, the lower court was in error to find that there was a strong basis in evidence, in either *Hastert* or the instant case, of a violation of the Voting Rights Act, or any other violation, such that a §2 remedy was necessary.

The lower court suggested that the districting plan ought to be considered less judicial than legislative because of the agreement to create a Hispanic §2 congressional district:

> The pre-trial negotiations and agreements between the diverse parties were highly reminiscent of the compromising which characterizes the legislative process. In fact, if the parties were aligned on partisan political grounds, the alignment would resemble the composition of the state legislature. . . . [T]he partisan alignment supported the reasonable inference that the bi-partisan agreements and stipulations reflected the beliefs of the General Assembly.

Opinion, Appendix, 22, n.21. The lower court's references to the "legislative" process occurring in court because of the agreement of the parties imposes a double-standard upon the Plaintiff, because while it required the Plaintiff to meet specific burdens of proof in challenging the plan precisely because it was court-ordered, it now seeks to call it "legislative," so as to avoid any challenge to its authority to approve it.

B. The Lower Court's Findings of Past Discrimination Fail to Support a Compelling State Interest.

The lower court failed to find a "strong basis in evidence that a remedy was necessary." *Shaw I, supra.* In the instant case, the district court relies upon the factual findings in *Hastert* of (1) racial bloc voting patterns and (2) "prior judicial determinations of past electoral discrimination" to support its conclusion that there was a compelling state interest. The lower court said:

> In this case, the *Hastert* court had a strong basis for finding a Section 2 violation and for adopting a redistricting plan that remedied that violation. In this regard, the *Hastert* court cited with approval prior judicial determination that found a definite pattern and practice of **[1]** electoral discrimination against the Hispanic community in the City of Chicago and the State of Illinois. The *Hastert* court further found that this historical discrimination against the Hispanic community was on-going, most visibly in the **[2]** racial bloc voting that effectively limited the Hispanic community to a disproportionately small number of elected Hispanic officials at the city and state-levels and more subtly in the social and economic discrimination that adversely affected effective political participation and

> representation. Under these circumstances, the creation of an Hispanic majority district advanced the state's compelling interest of remedying past electoral discrimination against Hispanics.

Opinion, Appendix, 66-67. The findings in *Hastert* and the lower court to support this conclusion are, however, insufficient as a matter of law.

Past Electoral Discrimination. For its findings of electoral discrimination, the lower court relied exclusively upon the findings of the *Hastert* court. The *Hastert* court, in turn, relied exclusively upon findings of discrimination in *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir.1984) and *Rybicki v. State Board of Elections*, 574 F.Supp 1082 (N.D.Ill.1982).[10]

In *Rybicki* the court found only generalized or "societal" discrimination against Hispanics:

> poor socio-economic conditions, unemployment, low voter registration and the like afflict both the black and Hispanic communities in Chicago to an extent which may be comparable to that presented in *White v. Regester*.

Rybicki at 1122. Further, there were no findings relating to vote dilution of the Hispanics; this was in large part because a settlement agreement was reached and approved by the court. *Id.* at 1124.

The court in *Ketchum* makes no reference to racial discrimination against Hispanics, with the exception of the failure to prepare election materials in Spanish in 1972 and to rely upon the purported findings of *Rybicki*. *See*, *Ketchum*, at 1406. In *Ketchum* the court refused to make a finding of past discrimination in light of the changes to the Voting Rights Act which made them "superfluous". *Id.* at 1409. Neither the *Hastert* court nor the lower court had any basis for finding, by way of these "prior determinations", that there was a "strong basis in evidence" to engage in remedial districting under §2.

Racial-Bloc Voting. Where there are no sufficient findings of the effects of past discrimination, it would not be sufficient to rely upon racial bloc voting exclusively to justify a race-based classification under the Equal Protection Clause. Thus,

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10 These cases concern city and state districting, whose districts may no longer be valid pursuant to *Shaw* and its progeny. Thus, these cases carry little weight for the *King* court to have relied upon.

presuming that ethnic bloc voting patterns may exist against Hispanics, an issue which the Plaintiff does not concede, it has been deemed necessary, along with other matters of proof, such as numerousness and compactness, for remedying a §2 violation under *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986).

C. There Was No Compelling Interest to Justify the Fourth Congressional District by way of Other Section 2 Districts

In order to justify the configuration of the Fourth Congressional District, the lower court did not review the Hispanic Fourth Congressional District in isolation. The lower court also reviewed the three African-American Congressional Districts that partially surround the Hispanic Fourth Congressional District. The lower court said that the configuration of the three separate African-American super-majority districts "necessarily affected the boundaries of the Hispanic majority district" and, thus, the *Hastert* court's ostensible compelling interest was to preserve those districts. See, Opinion, Appendix, 51, 70.

The lower court said

> [because] the radical alteration of the three African-American super-majority districts necessarily affected the boundaries of the Hispanic majority district [,] [t]he result was inevitable: a bizarrely drawn Hispanic district whose boundaries were created to maximize its Hispanic population while permitting the African-American super-majority districts with which it shared common borders to maximize their respective African-American populations in order to achieve the desired 65% minority population threshold in each district.

Opinion, Appendix, 51.

Thus, the lower court argued that the Fourth Congressional District was further narrowly tailored by the *Hastert* court because the *Hastert* court "determined that the [Fourth Congressional] district's extraordinary configuration was required to preserve shared communities of interest and protect the three African-American super-majority districts against impermissible retrogression." Opinion, Appendix, 70. Alternative districting plans suggest otherwise. Aguillon Affidavit, Appendix, 85; see, also, Maps from Aguillon Affidavit, Appendix, Attachments. Further, it is clear that

the lower court presumed that there is a compelling state interest in preserving districts other than the Hispanic district as a justification for the Hispanic district. This implies that any change in the 4th CD Hispanic district, even if that district is unconstitutional, would impermissibly affect the surrounding African-American districts.

D. The Lower Court Clearly Erred in Failing to Find, as a Matter of Fact, that Fewer than 50% of the Adult Citizens in the Challenged District in 1990 Were Hispanic.

The lower court committed clear error in finding that there was "'a strong basis in evidence' for finding that the threshold conditions for §2 liability are present. . ." when it found that "[the minority group] is sufficiently large . . . to constitute a majority in a single member district'. Opinion, Appendix, 61. *See, Bush v. Vera*, ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315857). The lower court said that "King has not established via competent evidence that the Hispanic citizen voting age population falls below fifty percent." Opinion, Appendix, 61. The ruling that the Plaintiff has the burden to show that citizenship population of Hispanic falls below 50% is completely unnecessary and onerous, as well as clearly erroneous. The Plaintiff only needs to show that because of the low citizenship rate, it affected the citizens of voting age population such that, although total population may be at 65%, the adult citizens among that population do not exceed 50%.

In *Thornburg v. Gingles* the court said that "*the minority group* must be able to demonstrate that it is sufficiently large . . . to constitute a majority in a single member district." *Id.* at 50, S.Ct. at 2766 (emphasis added). Indeed, where the Voting Rights Act under §2 states "elect[ing] representatives of their choice" is a standard, the focus cannot be on anything other than eligible voters: non-citizens cannot participate in elections, including Chicago. Without a citizen voting age population in excess of 50%, a minority population may not be large enough to control and, thereby "elect representatives of their choice" within a district. And where there are not enough citizen voters, "there neither has been a wrong nor can there be a remedy." *Shaw II*, at ___, S.Ct. at ___.

This Court has not yet ruled upon the citizenship issue as it relates to meeting the threshold factors of *Gingles*. *Johnson v. DeGrandy*,

114 S.Ct. at 2655-56 (1994), *Growe v. Emison*, 113 S.Ct. 1075, 1083 n.4. *But see, Campos v. City of Houston*, 894 F.Supp. 1062, 1065 (S.D. Tex. 1995, appeal pending), *Vera v. Richards*, 861 F.Supp. 1304, 1340 n.49 (S.D. Tex. 1994, *aff'd sub.nom. Bush v. Vera*, ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315857), *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989), *Skorepa v. City of Chula Vista*, 723 F.Supp. 1384, 1389 (S.D.Cal. 1989); *contra, LULAC v. North East Independent School District*, 903 F.Supp. 1071, 1084 n.97 (1995). The Voting Rights Act itself expressly protects citizens, mentioning "citizens" in both sections 2(a) and 2(b). *See, Voting Rights Act*, 42 U.S.C. 1973, Appendix, 72.

The only direct evidence of the citizenship characteristics of the 4th CD at the time of its creation came from Chris Cleveland, who testified that no more than 45% of the citizens in the district were of Hispanic heritage. The lower court misstates Mr. Cleveland's testimony. Cleveland testified that 45% of the adult citizens in the 4th CD are Hispanic, ***not*** that 45% of the adult Hispanics in the district were citizens. Cleveland Report, Appendix, 92-93; Cleveland Test., Appendix, 94.

The lower court suggests in footnote 58 that Cleveland's testimony is inconsistent with census data showing 56.3% of all Hispanics in Chicago are citizens. In fact, Mr. Cleveland's testimony was that 56% of all Chicago Hispanics are citizens. Cleveland Test., Appendix, 94. Other evidence at trial confirmed this view, including evidence of the Defendant-Intervenors. See, Al Filo Appendix, 97 (in 1986, 44% of all Chicago Hispanics were ineligible to vote); Latino Institute, Appendix, 95 (59.4% all Illinois Hispanics are citizens); MCIC Table, Appendix, 98 (61% of all Metro Chicago Hispanics are citizens).

Nor is the lower court's consideration of anecdotal evidence regarding citizenship applications sufficient to overcome the fact that only 45% of the district was citizen Hispanic in 1990 and permit the conclusion that more than 50% of the district is now citizen Hispanic. The evidence submitted by the Defendant-Intervenors did not establish that any more than 14,033 persons of Latino background were granted citizenship in the years 1990 through 1994. See, Taylor Report, Appendix, 98. Even if the Plaintiff conceded that all such persons were within the

4th CD, which is not likely the case, 14,033 is 2% of 571,530, the number of persons in the 4th CD at the time of its creation. And this growth in citizenship population among Hispanics does not take into account any influx of non-citizen immigration during the same period.

Further, the lower court considered the submission of evidence on Amnesty programs affecting the citizenship level. The court said "a large number of persons granted amnesty under that Act resided in zip code areas located within the northern and southern areas of the Fourth District. Cleveland's testimony did not compensate for amnesty programs, ..." Opinion, Appendix, 61, n.58. This evidence did not distinguish between Latino immigrants and others, and further, did not mention what is the percentage of persons who may actually receive naturalization status. Lastly, the court suggested that the election of an Hispanic candidate proves that the Hispanic citizen voters are numerous enough within the 4th CD. There was no evidence, however, that Congressman Guitierrez was the preferred candidate of choice of Hispanic voters in the Democratic primaries in 1992 and 1994.

The lower court clearly confused the testimony regarding the percentage of **district citizens who are Hispanic** with census data regarding the percentage of **Hispanics who are citizens**; this, in itself, is clear error. Moreover, where the lower court failed to apply the proper standard of proof upon the Defendants and Defendant-Intervenors in light of the strong inferences raised by the Plaintiff, its failure to find that fewer than 50% of the adult citizens in the 4th CD were Hispanic is clear error.

E. Hispanic Population Was Not Geographically Compact to Justify the Creation of a §2 Remedial District.

The lower court found that the Hispanic population was geographically compact. Opinion, Appendix, 52, n.48, 64. The lower court's example of a hypothetical rectangle to show that Hispanics are compact is a highly unreliable method, since it is applicable to *any* district; a rectangle could as easily be drawn around the population of North Carolina's 12th Congressional District, as well as any other non-compact area.

The Cook County Hispanic population map shows that the 4th CD was drawn to encompass the two areas of the greatest number of Hispanic population in the Chicago area. See, Taylor Report, Map 2: Latino Plurality Block Groups, Appendix, 100. Therefore, where the 4th CD is not compact, it is clear error to find that its population is geographically compact.

Moreover, there are 258,000 persons in the area between what has been referred to as the "two core areas." See, Population Between the "Islands", Appendix, 101. The primary population within that areas was African-American. *See, Hastert* at 646-48. In addition, the evidence of the *Hastert* case shows that a Hispanic district could not be created without using a connector of some sort. See, Maps of Orestes Aguillon, Appendix, Attachments 2, 3, Affidavit of Aguillon, Appendix, 85. Also, the 4th CD Map shows very little Hispanic population around its edges. See, 4th CD Map, Appendix, Attachment.

Again, the lower court failed to apply the proper standard of proof upon the Defendants and Defendant-Intervenors out of deference to the findings in *Hastert*. The lower court relied upon the finding in *Hastert* that the population was geographically compact, in distinction to the lower court's findings on citizenship, which did not rely upon *Hastert*. Opinion, Appendix 64. As discussed above the lower court's deference to the findings of *Hastert* is erroneous. Thus, where the lower court must apply strict scrutiny to determine if the 4th CD was narrowly tailored, and at the same time, held the Plaintiff to an abuse of discretion standard in his proof, the court, in effect, made an erroneous finding as a matter of law on that proof.

CONCLUSION

The treatment of citizens as a racial group, not as individuals, makes race-based classifications subject to judicial strict scrutiny. In *Miller v. Johnson* this Court said that "the Government must treat citizens 'as individuals, not as "simply components of a racial religious, sexual or national class"'" *Id.* at ___, 115 S.Ct. 2486 (1995) (citation omitted). Regarding group rights the Court in *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S.Ct. 2097 (1995) said that there is the

> basic principle that the Fifth and Fourteenth Amendments

> to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race - a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' . . . - should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.

Id. at ___, S.Ct. at 2112-13 (citations omitted). The Court in *Shaw v. Reno* recognized in respect to "group rights" that

> [t]he message that such districting sends to elected representatives is equally pernicious. When a district is obviously created to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. at S.Ct. 2827.

Common sense confirms that the 4th CD is bizarre and uncompact. As a matter of policy, without granting a reversal of the lower court, the 4th CD will instill the perception that there is no longer the necessary dedication to protect equality under the law, *for all persons*, and will lend greater authority to group rights and the pernicious divisions that result therefrom. In addition, as a matter of law, the 4th CD is unconstitutional. As a bizarre and uncompact configuration, found by the lower court to be predominantly based upon race, it cannot withstand strict scrutiny and ought to be disbanded.

The Court should note probable jurisdiction. Summary reversal is appropriate for the reasons stated herein. Otherwise the appeal should be set down for plenary review.

Respectfully submitted,

James C. Ten Broeck, Jr.
Counsel of Record
Attorney for Appellant

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

(2)

Supreme Court, U.S.
FILED

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No. A-930

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JAMES R. KING,
Appellant

vs.

STATE BOARD OF ELECTIONS, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

APPENDIX TO THE JURISDICTIONAL STATEMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES R. KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	95 C 827
	)	
STATE BOARD OF ELECTIONS, DAVID E. MURRAY, LAWRENCE E. JOHNSON, HANNELORE HUISMAN, JUDITH JONES, LANGDON D. NEAL, THERESA M. PETRONE, and WANDA REDNOUR,	)	Hon. David H. Coar Hon. Charles R. Norgle, Sr. Hon. Michael S. Kanne
	)	RECEIVED
Defendants,	)	
	)	March 22, 1996
and	)	
	)	H. Stuart Cunningham,
UNITED STATES OF AMERICA, BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ, and THE CHICAGO URBAN LEAGUE,	)	Clerk U.S. District Court
	)	
Defendant Intervenors.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JAMES R. KING, the Plaintiff in the above referenced matter, hereby appeals to the Supreme Court of the United States from the final order Denying the Plaintiff's request for injunctive and other relief against the Illinois State Board of Elections, entered on March 13, 1996.

This appeal is take pursuant to Title 28, United States Code, Section 1253.

Dated this 22nd day of March, 1996.

James C. Ten Broeck, Jr. /s/
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES R. KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	95 C 827
	)	
STATE BOARD OF ELECTIONS, DAVID E. MURRAY, LAWRENCE E. JOHNSON, HANNELORE HUISMAN, JUDITH JONES, LANGDON D. NEAL, THERESA M. PETRONE, and WANDA REDNOUR,	)	Hon. Michael S. Kanne Hon. Charles R. Norgle, Sr. Hon. David H. Coar
	)	
Defendants,	)	
	)	
and	)	
	)	
UNITED STATES OF AMERICA, BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ, and THE CHICAGO URBAN LEAGUE,	)	
	)	
Defendant Intervenors.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, James R. King ("King"), claims that the configuration of the Illinois Fourth Congressional District violates the Fourteenth Amendment. To address this claim, this court must review the history of the current district map and resolve the unusual procedural issues that accompany King's lawsuit.

Because the Illinois General Assembly failed to reapportion Illinois' legislative districts following the issuance of the 1990 census report, that task fell to an earlier panel of this court by default.[1] *See* **Hastert v. State Bd. of Elections**, 777 F. Supp. 634, 641 (N.D. Ill. 1991) (hereinafter "**Hastert**"). On November 6, 1991, the **Hastert** court issued an order reapportioning Illinois' twenty (20) congressional seats. Through this order, the **Hastert** court created a "majority-minority" Hispanic congressional district for the first time in Illinois history. The situs of this Hispanic majority district is Illinois' Fourth Congressional District, which is located in Cook County and the City of Chicago.[2] Since November 6, 1991, the United States Supreme Court has issued two course-altering opinions concerning congressional reapportionment and the Equal Protection Clause of the Fourteenth Amendment. *See* **Shaw v. Reno**, ___ U.S. ___, 113 S. Ct. 2816 (1993); **Miller v. Johnson**, ___ U.S. ___, 115 S. Ct. 2475 (1995). In addition, two congressional elections have been held; in both elections, the electorate of the Fourth Congressional District sent a Hispanic representative to Congress.

In February 1995, King, a resident of the Fourth Congressional District, filed the instant lawsuit challenging the constitutionality of the Hispanic majority district adopted in **Hastert**.[3] King contends that the borders of the Fourth

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[1]Article 4, §3(b) of the Illinois Constitution provides in pertinent part:

> In the year following each Federal decennial census year, the General Assembly shall redistrict the Legislative Districts . . . [by] June 30 of that year . . . .

[2]A map of the Fourth Congressional District is attached as Appendix Exhibit A.

[3]William J. Kelly and PAC for Middle America originally joined King as plaintiffs in this lawsuit. Kelly, a resident of Illinois' First Congressional District, challenged the **Hastert** court's reapportionment of the First Congressional District -- a "super-majority" African-American congressional district -- on the same grounds that King challenges the reapportionment of the Fourth

Congressional District were drawn predominately on the basis of race and without a compelling state interest to justify this racially-based classification. He also opposes the district's current configuration on moral grounds. King thus argues that the configuration of the Fourth Congressional District approved in **Hastert** violates the Equal Protection Clause of the Fourteenth Amendment. King's lawsuit compels this court to again enter the thicket of congressional redistricting. *See* **Hastert**, 777 F. Supp. at 641 (citation omitted). More specifically, this court must determine whether the *court-ordered* Hispanic majority district adopted in **Hastert** passes constitutional muster under the Supreme Court's most recent equal protection jurisprudence.

I. Relevant Procedural History

Following the filing of King's lawsuit, this court permitted Congressman Bobby Rush (Dem.-IL, 1st Dist.), Timuel Black, Al Johnson, Elvira Carrizales, Neomi Hernandez, the Chicago Urban League, and the United States Department of Justice ("DOJ") to intervene as defendants under Federal Rules of Civil Procedure 24(a) and (b).[4] In addition, the court permitted the Democratic National Committee to participate *amicus curiae*.

On August 15, 1995, King filed a motion for a preliminary injunction seeking to enjoin the Illinois Congressional primary and general elections presently scheduled for March 19, 1996, and November 5, 1996, respectively. King predicated his request for a preliminary injunction on the alleged constitutional deprivation articulated in his complaint; namely, that the **Hastert** court's configuration of the Fourth Congressional District on the basis of race violated his rights under the Fourteenth Amendment to

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Congressional District. Kelly and PAC for Middle America voluntarily dismissed their claims several months prior to trial.

[4]*See* **Pac for Middle America v. State Board of Elections**, No. 95 C 827, 1995 WL 571893 (N.D. Ill. Sept. 20, 1995) (three judge panel); Minute Order dated Nov. 8, 1995. Rush, Johnson, Hernandez, and the Chicago Urban League all participated in the **Hastert** litigation.

participate in a "color-blind election process." Pursuant to Rule 65(a)(2), this court consolidated the hearing on King's preliminary injunction motion with the three day trial conducted December 13-15, 1995, on the merits of King's complaint. *See* **Fed. R. Civ. P. 65(a)(2)**. Since many of the arguments advanced at trial by King either directly or indirectly challenged or implicated factual findings and legal conclusions made by the **Hastert** court, this court first had to resolve several procedural issues concerning the relationship between this litigation and the **Hastert** litigation. Two issues predominated: first, whether and to what extent the parties are bound by the **Hastert** court's findings of fact; and second, the standard by which this court would review the **Hastert** court's conclusions of law.

A. Standards Governing the **Hastert** court's Findings of Fact

1. Rule 60(b)

Defendant State Board of Elections ("SBOE") and defendant-intervenor DOJ argued that King's lawsuit should be considered an attempt to modify or vacate the **Hastert** court's reapportionment order since it essentially attacked the factual findings and legal conclusions of the **Hastert** opinion. Based upon this characterization, the SBOE and DOJ maintained that King's lawsuit should have been transferred to the **Hastert** panel pursuant to Local General Rule 2.21D(8).[5] If the case had been

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[5]The Honorable Michael S. Kanne, Charles R. Norgle, Sr., and Suzanne B. Conlon presided over the **Hastert** litigation. Local General Rule 2.21D provides:

> **Direct Assignment of Cases to the Calendar of a Judge**
>
> In each of the following instances, the assignment clerk shall assign the case to a judge in the manner specified:
>
> * * *
>
> (8) *Cases filed to enforce, modify, or vacate judgment*
>
> Proceedings to enforce, modify, or vacate a judgment should be brought within the case in which the judgment was entered. If a separate case is filed for the purpose of enforcing, modifying, or vacating a judgment entered in a case previously filed in this District, the case

transferred, King would have had to petition the **Hastert** court to reopen those proceedings and permit him to intervene. The **Hastert** court, in turn, would have considered King's challenges to its November 1991 reapportionment order under Rule 60(b)(5) or (b)(6).[6] Proceeding under Rule 60(b) would have been a daunting

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> shall be assigned directly to the judge to whom the earlier case was assigned.

[6]Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment . . . .

Fed. R. Civ. P. 60(b)(5), (b)(6). Rule 60(b) also provides that a court may "entertain an independent action to relieve a party from a judgment, order or proceeding." Resort to an independent action -- an action in equity to obtain relief from a judgment -- may only be had rarely and under exceptional circumstances. **11 Wright & Miller, Federal Practice and Procedure: Civil.2d §2868**, at 397-98 (1995). An independent action in equity has the following "indispensable" elements:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Id. at 397 & n.5 (citations omitted). King's action does not contain all of these indispensable elements and thus cannot be characterized as an independent action in equity. *See, e.g.*, **Rader v. Cliburn**, 476 F.2d 182, 184 (6th Cir. 1973) (lawsuit which alleged that a federal judge failed to consider a relevant state statute when he ordered the reapportionment of the Macon County, Tennessee's Board of Education Districts two years earlier was not a case of unusual or exceptional circumstances meriting relief as an independent suit in equity).

task, since "relief from a judgment under Rule 60(b) is an extraordinary remedy reserved for the exceptional case."[7] *See* **Camp v. Gregory**, 67 F.3d 1286, 1290 (7th Cir. 1995).

This court, which includes two of the three judges who presided over the **Hastert** case, declined to transfer King's case as suggested by the SBOE and DOJ for three reasons. First, the

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[7]Federal Rules of Civil Procedure 59(e) and 60(b) both govern post-judgment motions attacking the merits of a district court's decisions. *See* **Russell v. Delco Remy Div. of Gen. Motors**, 51 F.3d 746, 749 (7th Cir. 1995).

Motions for Reconsideration under Rule 59(e) permit a court to "correct manifest errors of law or fact or to present newly discovered evidence." **Id.** (*citing* **Bank of Waunakee v. Rochester Cheese Sales, Inc.**, 906 F.2d 1185, 1191 (7th Cir. 1990)); **Keene Corp. v. International Fidelity Ins. Co.**, 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd* 736 F.2d 388 (7th Cir. 1984). In addition, a motion for reconsideration is appropriate where a controlling or significant change in the law or facts has occurred since the issue was submitted to the court. **Waunakee**, 906 F.2d at 1191 (citation omitted). The Rule permits a court to correct its own errors, thereby avoiding the expenses and burdens of an appeal. **Russell**, 51 F.3d at 749. A Rule 59(e) motion must be filed within ten (10) days of the judgment. **Fed. R. Civ. P. 59(e)**; **Russell**, 51 F.3d at 749; **Helms v. Resolution Trust Corp.**, 43 F.3d 1163, 1166-67 (7th Cir. 1995) (a motion to alter or amend a judgment served more than ten days after a final judgment is treated as a Rule 60(b) motion).

Rule 60(b) "enables a court to grant relief from a judgment under the particular circumstances listed in the text of the rule." **Russell**, 51 F.3d at 749. It was designed to "address mistakes attributable to special circumstances and not merely to erroneous applications of law." **Id.** It affords extraordinary relief and is application is limited to extraordinary circumstances. **Id.**; **Harold Washington Party v. Cook Co., Ill. Democratic Party**, 984 F.2d 875, 879 (7th Cir.), *cert. denied* ___ U.S. ___, 114 S. Ct. 86 (1993); **Bally Export Corp. v. Balicar, Ltd.**, 804 F.2d 398, 400 (7th Cir. 1986). It too permits a court to correct only "manifest errors of law or fact." *See* **United States ex rel. Felder v. Gramley**, 893 F. Supp. 768, 773 (N.D. Ill. 1995); **Jones v. Banks**, 892 F. Supp. 988, 989 (N.D. Ill. 1995) (citation omitted).

Rules 59(e) and 60(b) thus provide some overlapping relief, albeit the overlap is imperfect. **Russell**, 51 F.3d at 749. "A court should correct a manifest error of law under Rule 59(e). . . . Rule 60(b), on the other hand, is not an appropriate vehicle for addressing simple legal error; otherwise, a party could circumvent the ordinary time limitation for filing a notice of appeal." **Id.** The correction of mistakes under Rule 60(b) is left to the district court's sound discretion, but that discretion must be exercised with a view to the differences inherent in the two rules. **Id.**

doctrine of the law of the case mandated this court's rejection of the SBOE and DOJ argument. The law of the case doctrine typically provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." **Donohoe v. Consolidated Operating & Prod. Corp.**, 30 F.3d 907, 910 (7th Cir. 1994) (*quoting* **Arizona v. California**, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391 (1983)). The doctrine applies not only to the prior decisions of the same court, but also to prior decisions of a coordinate court in the same case. **Id.** (*citing* **Christianson v. Colt Indus. Operating Corp.**, 486 U.S. 800, 815-18, 108 S. Ct. 2166, 2177-79 (1988)). In this context, the doctrine of the law of the case functions like the doctrine governing reconsideration; that is, "a court will ordinarily not reconsider its own decision made at an earlier stage of the trial or on a prior appeal, absent clear and convincing reasons to reexamine the prior ruling." *See* **Johnson v. Burken**, 930 F.2d 1202, 1207 (7th Cir. 1991) (*quoting* **Gertz v. Robert Welch, Inc.**, 680 F.2d 527, 532 (7th Cir. 1982), *cert. denied* 459 U.S. 1226, 103 S.Ct. 1233 (1983)). Thus, when a court is asked to change a prior decision in its own case or in the case of a coordinate court, the law of the case doctrine permits it to avoid reexamining the prior decision "unless powerful reasons are given for doing so." **Id.**

In this case, King filed a petition for the appointment of a three judge panel pursuant to 28 U.S.C. section 2284(a) shortly after filing his complaint.[8] The SBOE agreed that a three judge panel was appropriate but argued that the three judges who presided over the **Hastert** litigation should be reappointed since King's complaint sought "to modify" that court's redistricting order. (*See* SBOE Resp. Mem., at ¶¶4-5). In accordance with 28 U.S.C. section 2284(b)(1), the petition was transferred to the Honorable Richard A. Posner, Chief Judge of the Seventh Circuit

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[8]Section 2284(a) provides that "[a] district court of three judges shall be convened when

. . . an action is filed challenging the constitutionality of the apportionment of congressional districts . . . ." **28 U.S.C. §2284(a)**.

Court of Appeals, for decision.[9] Judge Posner appointed the present panel, and thereby rejected the SBOE's request for assignment of the case to the **Hastert** court.

Second, neither the SBOE nor DOJ established that Local Rule 2.21D(8) applied to the unique circumstances of King's complaint. The purpose of Local Rule 2.21D(8) appears to be three-fold: to prevent forum or judge shopping; to ensure continuity of decisions; and to promote judicial economy. Given these purposes, it is axiomatic that when a court enters a judgment resolving a dispute among certain parties, the same court must preside over any secondary action brought by one of the parties to enforce, modify or vacate that judgment. King, however, does not fall within the parameters of this axiom. He was neither a party to nor in privity with any party to the **Hastert** proceeding, and thus lacked standing to petition the **Hastert** court under Rule 60(b) for an order vacating or modifying its judgment order. *See* **Fed. R. Civ. P. R. 60(b)**; **National Acceptance Co. of Am., Inc. v. Frigidmeats, Inc.**, 627 F.2d 764, 766 (7th Cir. 1980) ("[i]t is well settled that . . . 'one who was not a party lacks standing to make a

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[9]Section 2284 states in pertinent part:

> (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:
>
> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

28 U.S.C. §2284(b)(1).

60(b) motion'") (*quoting* **Wright & Miller, Federal Practice and Procedure §2865**, at 225-26 (1973)). In addition, there is no evidence that he engaged in any impermissible judge shopping, which would have been a particularly fruitless endeavor since Judge Posner appointed two of the three **Hastert** judges to preside over this case. Similarly, the interests of judicial economy were not compelling as King alleged that both the governing law and the relevant facts had changed since the **Hastert** court issued its reapportionment order. Thus, the law of the case doctrine notwithstanding, the DOJ and SBOE failed to establish that King's complaint was eligible for reassignment under Local Rule 2.21D(8).

Finally, the **Hastert** court did not retain jurisdiction to hear and decide future constitutional challenges to its reapportionment order. The DOJ argued that the **Hastert** court implicitly retained jurisdiction to enforce or modify its judgment in light of changed circumstances, but the authority it cited concerned the modification of injunctive relief. *See* **System Fed'n No. 91, Ry. Emp. Dept., AFL-CIO, v. Wright**, 364 U.S. 642, 647-48, 81 S. Ct. 368, 371 (1961) (district court abused its discretion in refusing to modify consent decree that enjoined a number of specific discriminatory acts); **United States v. Swift & Co.**, 286 U.S. 106, 114, 52 S. Ct. 460, 462 (1932) (court in equity has power to modify an injunction to adapt to changed conditions, even where the injunction was entered by consent decree). This authority is inapposite as the **Hastert** court issued its reapportionment order pursuant to Section 2 of the Voting Rights Act. To that end, the **Hastert** court ordered that the court-ordered redistricting plan "shall govern the nomination and election of members of the House of Representatives from the State of Illinois, effective with respect to the 1992 primary and continuing until Illinois congressional districts are reapportioned in accordance with law." **Hastert**, 777 F. Supp. at 662. The **Hastert** court thus not only declined to retain jurisdiction to consider subsequent non-party challenges to its reapportionment order but, equally important, it conditionally limited the duration of its

order.[10] *See* **Jackson v. DeSoto Parish Sch. Bd.**, 585 F.2d 726, 730 n.1 (5th Cir. 1978) ("[w]e note . . . that in reapportionment, unlike school desegregation and institutional reform cases, the court's jurisdiction is not continuing, and the plan, once adopted and acted upon [*i.e.*, an election is held], does not require further judicial supervision").

Accordingly, this court did not transfer King's complaint to the **Hastert** court for further proceedings under Rule 60(b).

2. Conditional Judicial Notice

Although King was not a party to the **Hastert** litigation and thus could not be bound by that court's findings of fact or judgment under the doctrines of *collateral estoppel* or *res judicata*,[11] his complaint both directly and indirectly challenged

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[10]In this regard, the **Hastert** court essentially foresaw that a revised reapportionment plan could supplant and supersede its order either through legislative action or a subsequent court challenge, provided the revised plan was "in accordance with [the] law." Thus, a subsequent court challenge to the **Hastert** court's order would not threaten the interests of comity or the orderly administration of justice where the challenge was based upon a change in law.

[11]The doctrine of collateral estoppel provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." **Allen v. McCurry**, 449 U.S. 90, 94, 101 S. Ct. 411, 415 (1980); *accord* **Havoco of Am., Ltd. v. Freeman, Atkins & Coleman, Ltd.**, 58 F.3d 303, 307 (7th Cir. 1995). Collateral estoppel precludes relitigation of issues in a subsequent proceeding when:

> (1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on the merits; (3) the resolution of the particular issue was necessary to the result; and (4) the issues are identical.

Havoco, 58 F.3d at 307; **Kraushaar v. Flanigan**, 45 F.3d 1040, 1050 (7th Cir. 1995).

In contrast, under *res judicata*, "a judgment on the merits in a prior suit bars a second suit involving the same parties, or their proxies, based on the same cause of action." **Parklane Hosiery Co., Inc. v. Shore**, 439 U.S. 322, 326 n.5, 99 S.Ct. 645, 649 n.5 (1979); *accord* **Brzostowski v. Laidlaw Waste Systems, Inc.**, 49 F.3d 337, 338 (7th Cir. 1995). Three elements must exist for *res*

the **Hastert** court's findings of fact and judgment. In recognition of the unique nature of King's claim and to expedite the proceedings at trial, this court took judicial notice of the **Hastert** court's findings of fact under Federal Rule of Evidence 201. *See, e.g.*, **Philips Medical Sys. Int'l, B.V. v. Bruetman**, 982 F.2d 211, 215 n.2 (7th Cir. 1992) (federal courts may take judicial notice of proceedings, including evidence, in other courts both within and outside of the federal judicial system "if the proceedings have a direct relation to matters at issue"); **Green v. Warden, U.S. Penitentiary**, 699 F.2d 364, 369 (7th Cir.), *cert. denied* 461 U.S. 960, 103 S. Ct. 2436 (1983) (same). More specifically, this court informed the parties that it would admit into evidence the **Hastert** court's finding of facts and would adopt those findings as conclusive unless King showed by law or otherwise that the **Hastert** court either erred in making specific findings of fact or that the circumstances had changed since November 1991 such that specific findings of fact were no longer valid and needed to be modified. *See* Tr., at 36, 652.

This court conditionally admitted the **Hastert** court's findings of fact through judicial notice for two reasons. First, had King been a party or in privity with a party to the **Hastert** action, his constitutional challenge of the **Hastert** court's order and findings of fact would have proceeded under Rule 60(b).[12] Under

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judicata to apply: (1) a judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action between both suits. **Brzostowski**, 49 F.3d at 338.

[12]Assuming standing, King at a minimum could have moved for a modification of the Hastert court's order under Rule 60(b)(6). A motion for relief under Rule 60(b)(6) is only appropriate if the grounds for relief do not fit under any of the other subsections of Rule 60(b). **Margoles v. Johns**, 798 F.2d 1069, 1073 n.6 (7th Cir. 1986) (citation omitted), *cert. denied* 482 U.S. 905, 107 S.Ct. 2482 (1983). Relief under Rule 60(b)(6) is only warranted "upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." **Id.** at 1073 (*citing* **Ackerman v. United States**, 340 U.S. 193, 71 S. Ct. 209 (1950)). While a post-judgment change in decisional law, without more, is insufficient to constitute an extraordinary circumstance permitting relief under Rule 60(b), *see* **McKnight v. United States Steel Corp.**, 726 F.2d 333, 336 (7th Cir. 1984), extraordinary circumstances will be found to

Rule 60(b), the **Hastert** court's findings of fact made pursuant to Rule 52(a) would have been law of the case. *See* **Bennett v. Arrington**, 806 F. Supp. 926, 927 n.2 (N.D. Ala. 1992), *aff'd in part, rev'd in part on other grounds* 20 F.3d 1525 (11th Cir. 1994).[13] As such, the **Hastert** court would not have reexamined its factual findings to decide a Rule 60(b) motion unless powerful reasons existed for doing so -- such as the occurrence of manifest error or a controlling or significant change in the factual

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exist where, as here, the change in decisional law may render the court's prior decision unconstitutional. *See, e.g.*, **McGeshick v. Choucair**, 72 F.3d 62, 63 (7th Cir. 1995) ("A supervening change in governing law that calls into serious question the correctness of the court's judgment may justify recall of a mandate.").

In addition, a motion for relief from judgment under Rule 60(b)(5) or (b)(6) must be made "within a reasonable time." *See* **Fed. R. Civ. P. 60(b)**. Because King based his constitutional challenge in part on a change in the governing law, any inquiry into the timeliness of King's challenge must necessarily focus on the passage of time between the advent of the changed law (*i.e.*, the issuance of the Supreme Court's **Shaw v. Reno** decision in June 1993) and the filing of King's complaint. This twenty month time period (*i.e.*, June 1993 to February 1995) is not too excessive to be declared unreasonable. *See* **PAC for Middle Am. v. State Bd. of Elections**, No. 95 C 827, 1995 WL 571887, *4 (N.D. Ill. Sept. 20, 1995) (three judge panel).

[13]The **Bennett** litigation originated in 1981 as a reverse discrimination claim arising out of a consent decree. *See* **Bennett**, 806 F. Supp. at 927. Following a trial in 1985, the court ruled against the plaintiffs on their reverse discrimination claim. *See* **In re Birmingham Reverse Discrimination Employment Litigation**, No. 84-P-0903-S, 1985 WL 56690 (N.D. Ala. 1985). The Eleventh Circuit reversed, *see* **In re Birmingham Reverse Discrimination Employment Litigation**, 833 F.2d 1492 (11th Cir. 1987), *aff'd* **Martin v. Wilks**, 490 U.S. 755, 109 S. Ct. 2180 (1989). The Supreme Court remanded the case to the district court for further trial on the plaintiffs' reverse discrimination claim. On remand, the district court adopted the findings of fact of the 1985 trial court under the law of the case doctrine, explaining:

> Numerous findings of fact were made by the district court [in 1985]. . . . There is no need to repeat these findings, which were not set aside on appeal and under the law of the case remain as determinations for purposes of this decision.

Bennett, 806 F.2d at 927 n.2 (citation omitted). Like the **Bennett** court, this court will adopt the **Hastert** court's factual determinations for the purposes of this decision, excluding any clearly erroneous findings and any findings that are no longer valid due to changed circumstances.

circumstances.[14] Since King's lawsuit is at its very core a challenge to the **Hastert** court's order, this court concluded that King's lack of standing under Rule 60(b) should not determine the standard of review applicable to the **Hastert** court's findings of fact. The court therefore adopted the standards that would have applied had King sought to modify the **Hastert** order under Rule 60(b).[15] The court also conditionally admitted the Hastert court's findings of fact to promote important interests in finality and judicial economy.[16]

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[14]As previously noted, the law of the case doctrine essentially functions as a motion for reconsideration in this context. *See* **Johnson v. Burken**, 930 F.2d 1202, 1207 (7th Cir. 1991). The grounds for entertaining a motion for reconsideration -- to correct manifest errors of law or fact or to consider controlling or significant changes in the law or facts since the matter was submitted to the court -- thus define the grounds for entertaining a subsequent challenge under Rule 60(b) to a court's specific findings of fact. *See* **United States v. Gramley**, 893 F. Supp. 768, 773 (N.D. Ill. 1995) (Rule 60(b) permits a court to correct "manifest errors of law or fact"); **Jones v. Banks**, 892 F. Supp. 988, 989 (N.D. Ill. 1995) (same); *see also* **Bank of Waunakee v. Rochester Cheese Sales, Inc.**, 906 F.2d 1185, 1191 (7th Cir. 1990) (recognizing grounds for reconsideration due to changes in controlling law or facts).

[15]This court has slightly modified the standards to comport to the procedural posture of this case (*i.e.*, King has filed an independent lawsuit rather than a Rule 60(b) motion to vacate of modify the **Hastert** judgment). Accordingly, this court will consider the **Hastert** court's findings of fact conclusive unless King establishes that the **Hastert** court committed clear error in making specific findings of fact or proves by a preponderance of the evidence that the factual circumstances have changed since the issuance of the **Hastert** decision.

[16]The concepts of finality and judicial economy provide a very pragmatic foundation for the standard of review adopted by this court. Since King has brought this lawsuit in his individual capacity rather than on behalf of a certified class, this court's findings of fact would not bind other potential private litigants who are not in privity with King. It is therefore conceivable that these other potential litigants, displeased by this court's ruling, might separately file a series of lawsuits challenging the constitutionality of the Fourth Congressional District. If the court failed to take judicial notice of and conditionally admit the **Hastert** court's factual findings, its ability to render a final judgment on the district's constitutionality would prove elusive. Each successive challenge would require the development of new, potentially inconsistent factual records. By taking judicial notice of and conditionally admitting its prior fact findings, the court has established a common core of facts that may only be modified by proof of

To demonstrate that the **Hastert** court erred in making a specific finding of fact, King has to establish that the court committed clear error.[17] *See* **Fed. R. Civ. P. 52(a)**. A finding of fact is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." **Anderson v. City of Bessemer City, N.C.**, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985) (citation omitted); **United States v. United States Gypsum Co.**, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948); **United States v. Price**, 54 F.3d 342, 348 (7th Cir. 1995). Under this standard, the court must strongly defer to the trier of fact's findings. **In re Love**, 957 F.2d 1350, 1354 (7th Cir. 1992). As such, "if the trial court's account of the evidence is plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced that it would have weighted the evidence differently as a trier of fact." **Id.** "Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." **Anderson**, 470 U.S. at 574, 105 S. Ct. at 1511. Accordingly, unless clear error is established, this court will defer to the **Hastert** court's

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changed circumstances or demonstration of clear error. If the party challenging the district's constitutionality fails to allege or establish the existence of changed factual circumstances or clear error of significant magnitude to affect the constitutional analysis, a court should be able to dispose of the lawsuit under Rules 12, 56 or 50(a). In this manner, this court's decision to take judicial notice of the **Hastert** court's findings of fact furthers the interests of finality and judicial economy while avoiding the potential hazards associated with successive, cumulative constitutional challenges brought by independent litigants.

[17]Rule 52, entitled "Findings by the Court; Judgment on Partial Findings" provides in pertinent part:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusion of law thereon, ... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

findings of fact. *See* **Johnson v. Mortham**, ___ F. Supp. ___, 1995 WL 707856 (N.D. Fla. Nov. 20, 1995).[18]

Alternatively, King must establish by a preponderance of evidence that specific factual circumstances have changed. *See* **Jackson v. DeSoto Parish Sch. Bd.**, 585 F.2d 726, 730 (5th Cir. 1978). Once such evidence has been proffered, this court will analyze the particular finding of fact *de novo*.

In addition to taking judicial notice of the **Hastert** court's findings of fact, this court took judicial notice of the evidence presented to the **Hastert** court. (Tr. at 638). The court admitted this evidence for the limited purpose of establishing the evidentiary record upon which the **Hastert** court relied to make its decision. (*Id.*). The **Hastert** court's evidentiary record was not admitted for any other purpose, except where one of the parties individually or jointly moved for the admission of a particular portion of that record.

B. Standard of Review of the **Hastert** court's Conclusions of Law

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[18]A brief review of the on-going **Johnson** litigation is required. After the Florida legislature failed to adopt a congressional reapportionment plan to comply with the 1990 census results, the task fell to the federal court. The district court initially held the existing plan unconstitutional, and appointed a Master to recommend a replacement plan. *See* **DeGrandy v. Wetherell**, 794 F. Supp. 1076 (N.D. Fla. 1992). The **DeGrandy** court subsequently adopted the Master's Report and Recommendation, which created two African-American majority-minority districts and one African-American influence district. Following the Supreme Court's decision in **Shaw**, plaintiffs filed a lawsuit in 1994 alleging that District 3 (one of the majority-minority districts created in the 1992 court order) violated the Equal Protection Clause. The court found that District 3 was oddly configured. *See* **Johnson**, ___ F. Supp. at ___, 1995 WL 707856, at *2. The plaintiff subsequently moved for summary judgment. The **Johnson** court granted the motion in part, concluding as a matter of law, that the plaintiffs proved that racial considerations predominated in the drawing of District 3. The **Johnson** court relied upon specific findings made by the **DeGrandy** court as the basis for its ruling. **Id.** at ___, 1995 WL 707856, at *20. The **Johnson** court denied, however, plaintiffs' motion for summary judgment with respect to whether District 3 survives strict scrutiny.

An appellate court traditionally reviews a district court's conclusions of law *de novo*. *See* **Apostol v. Landau**, 957 F.2d 339, 341 (7th Cir. 1992). Under this standard, the appellate court is not bound by the district court's legal conclusions but instead examines the law "anew." **Lulich v. Sherwin-Williams Co.**, 992 F.2d 719, 721 (7th Cir. 1993); **Black's Law Dict.** 392 (5th ed. 1979). Although this court is not an appellate court, the nature of King's complaint requires it to review the **Hastert** court's legal conclusions. Under these circumstances, this court adopted the law of the case doctrine as the standard of review for the **Hastert** court's legal conclusions. As with a motion to vacate or modify a judgment under Rule 60(b), this court will not disturb the **Hastert** court's conclusions of law but for manifest or plain error. *See* **Russell v. Delco Remy Div. of Gen. Motors**, 51 F.3d 746, 749 (7th Cir. 1995) (discussed *supra* in footnote 8). At the same time, however, this court will review *de novo* the **Hastert** court's conclusions of law where the decisional law has arguably changed.

King proffers three "powerful reasons" warranting reexamination of the **Hastert** court's findings of fact and conclusions of law: first, the governing law has changed as a result of the Supreme Court's decisions in **Shaw** and **Miller**; second, certain factual findings made by the **Hastert** court were clearly erroneous; and third, the facts have changed since November 1991.

III. The Hastert Court's Decision

The 1990 decennial census report revealed that Illinois' population had grown by 4,084 people, or 0.0357%, between 1980 and 1990. **Hastert**, 777 F. Supp. at 637. Because the rate of Illinois' population growth was proportionally smaller than that of the United States as a whole, Illinois was only entitled to twenty seats in the United States House of Representatives rather than its previous twenty-two. The Illinois constitution required the General Assembly to reapportion the state's congressional districts to comport with the 1990 census results; however, it failed to do

so. As a result of the General Assembly's abdication of its constitutional responsibility, five separate lawsuits were filed seeking a common declaration; namely, Illinois' then existing congressional districting plan was unconstitutional due to the population and demographic changes represented in the 1990 census report. **Id.**

The Republican Party members of the 1990 Illinois congressional delegation (the "*Hastert*" plaintiffs) filed the first lawsuit on June 27, 1991. Shortly thereafter, a group of Hispanic and African-American resident-voters (the "*Nieves*" plaintiffs) filed the second lawsuit seeking, *inter alia*, the creation of a majority-minority Hispanic congressional district under Section 2 of the Voting Rights Act, 42 U.S.C. §1973. Next, a group of resident voters from various Illinois congressional districts, ostensibly acting on behalf of the Democratic Party members of the 1990 Illinois congressional delegation (the "*Rosebrook*" plaintiffs), filed the third lawsuit. Representative Cardiss Collins (D-IL; 7th Dist.) and Representative Charles Hayes (D-IL; 1st Dist.) jointly filed the fourth lawsuit (the "*Collins*" plaintiffs). Finally, the Chicago Urban League filed the fifth lawsuit on behalf of the resident voters in the then existing majority-minority African-American congressional districts. Each group of plaintiffs submitted a proposed redistricting plan to the court for consideration.[19] All five lawsuits were consolidated into a single proceeding for trial.

The **Hastert** court conducted a two day trial beginning on October 7, 1991. Due to time constraints imposed by the 1992 election filing deadlines, the court streamlined the proceedings "in a manner that would still enable the parties to present a complete

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[19]The **Hastert** court also permitted several individuals and organizations to intervene. Of these plaintiffs-intervenors, only then Representative Augustus Savage (D-IL; 2d Dist.) and the Harold Washington Party, acting in tandem, submitted a proposed redistricting map to the court. **Hastert**, 777 F. Supp. at 639. Thus, at the onset of the case, six different redistricting plans had been submitted to the court.

record of the serious constitutional matters at issue."[20] **Hastert**, 777 F. Supp. at 639. To that end, the court "directed the parties to submit their evidence in the form of affidavits and depositions, supplemented by any maps and statistical data . . . ." **Id.** at 639-40. The court limited the parties to a single proposed plan and map at trial, and entertained argument mainly through post-trial briefs. **Id.** at 640.

As a result of these streamlined proceedings, the parties resolved numerous issues through negotiation, concession, and stipulation. In so doing, the parties not only effectively supplanted the **Hastert** court's fact finding role in many instances but also narrowed the number of substantive legal issues the court needed to decide. The court explained:

> The parties worked diligently during discovery and the two-day trial to resolve numerous areas of significant disagreement in their competing plans. The pre-trial proceedings were marked by a succession of amendments to the principal redistricting proposals, with each of the new amended plans incrementally eliminating a complex area of potential conflict.

Id. at 640. The magnitude of complex issues resolved by stipulation among the parties was unprecedented.[21] According to

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[20]The court's goal was to issue its judgment "in a timely fashion to allow any of the participants adequate time for appeal to the Supreme Court prior to the December 16, 1991 filing deadline for the March 17, 1992 congressional primary elections." **Hastert**, 777 F. Supp. at 639.

[21]The pre-trial negotiations and agreements between the diverse parties were highly reminiscent of the compromising which characterizes the legislative process. In fact, if the parties were aligned on partisan political grounds, the alignment would resemble the composition of the state legislature (*i.e.*, the *Hastert* Republicans versus the *Rosebrook et al.* Democrats). Because of this partisan alignment, agreements reached by the parties had an important value beyond merely advancing the litigation's timetable. More specifically, the partisan alignment supported the reasonable inference that the bi-partisan agreements and stipulations reflected the beliefs of the General Assembly.

the **Hastert** court, not only did all of the parties agree throughout the proceedings that "the population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district," but they also reached an agreement prior to trial as to "the configuration of the proposed Hispanic majority district." **Id.** These pre-trial agreements between the parties had significant consequences on the conduct and outcome of the trial.

> By reaching an agreement on the configuration of a proposed Hispanic district, the parties greatly simplified a perplexing issue. Indeed, *an agreement on this issue may be the crucial factor in facilitating the creation of an Hispanic district*. The agreement on the proposed Hispanic district removed the Hispanic contingent among the *Nieves* plaintiffs as active participants at trial.[22]

Id. (emphasis added).

The **Hastert** court summarized the effect of the streamlined proceedings as follows:

> As a consequence of the admirable efforts of counsel to come to an agreement on many issues, the trial focused primarily on the redistricting proposals of the *Hastert* and *Rosebrook* plaintiffs. We are left primarily with the task of determining which of the two proposed plans best meets the goals and criteria, both constitutional and non-constitutional, enumerated by the Supreme Court.

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[22]In addition to the parties' agreement about the creation and configuration of an Hispanic majority-minority district, the parties also resolved via stipulation the configuration of the Second Congressional District (a super-majority African-American Congressional District) and the location of certain downstate minority communities. **Id.**

Id. In short, the parties' pre-trial negotiations and agreements significantly narrowed the court's role. Essentially two tasks (relevant to this lawsuit) remained for the **Hastert** court: first, to analyze the revised *Hastert* and *Rosebrook* redistricting plans to determine which plan better satisfied constitutional standards;[23] and second, to determine whether Section 2 of the Voting Rights Act required the creation of an Hispanic majority-minority district.

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[23]It was a foregone conclusion that the 1980 redistricting plan was unconstitutional.

> All parties are in agreement that the existing congressional district plan is both unconstitutional and impracticable. Consequently, we proceed directly to an evaluation of the constitutional and legal merits of the proposed *Hastert* and *Rosebrook* plans.

Hastert, 777 F. Supp. at 641. The court analyzed the *Hastert* third amended redistricting plan and the *Rosebrook* first amended redistricting plan. **Id.** at 641 n.8.

A. The Court's Constitutional Analysis

The proposed *Hastert* and *Rosebrook* redistricting plans were substantially similar in purpose, design and configuration but differed in the final allocation of the electorate within the twenty congressional districts.[24] The **Hastert** court therefore set forth to determine which proposed plan better satisfied the governing constitutional requirements of population equality, fairness to minority voting rights (*i.e.*, vote dilution), and political fairness.

The court first assessed the two proposed plans under the one person, one vote theory of representation articulated in **Wesberry v. Sanders**, 376 U.S. 1, 84 S. Ct. 526 (1964). The court ultimately concluded that the proposed *Hastert* plan, with a total deviation of 0.00017% from the ideal congressional district population of 571,530, better advanced the one person, one vote principle than the proposed *Rosebrook* plan, which had a total deviation of 0.00297%. **Hastert**, 777 F. Supp. at 644.

The court next evaluated the proposed plans for their fairness to the voting rights of racial and language minorities. **Hastert**, 777 F. Supp. at 645. This inquiry required the court to assess whether either of the proposed redistricting plans had the discriminatory effect of diluting the power of minority votes.[25] The court found that neither proposal diluted minority voting

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[24]According to the court, "protection of the interests of minority communities was a driving force for both the *Hastert* and *Rosebrook* plaintiffs." **Hastert**, 777 F. Supp. at 646 n.19. As a result of the bipartisan pre-trial negotiations, no minority group objected to the proposed revised *Hastert* or *Rosebrook* redistricting plans. **Id.**

[25]Vote dilution occurs either by fragmenting large concentrations of minority populations and dispersing them into separate political districts, or by concentrating minorities into districts where they constitute an excessive majority. **Hastert**, 777 F. Supp. at 646 (*citing* **Thornburg v. Gingles**, 478 U.S. 30, 46 n.11, 106 S. Ct. 2752, 2764 n.11 (1986)).

power and ultimately concluded that the proposed *Hastert* plan better satisfied this constitutional criterion.[26]

Finally, the court assessed the proposed plans for political fairness, meaning whether one or both of the proposed plans had the effect of discriminating against an identifiable political group. **Hastert**, 777 F. Supp. at 655, 656. Both plans sought to address the then existing discrepancy between Democratic and Republican congressional representation.[27] The *Rosebrook* plaintiffs argued, however, that the *Hastert* plan would result in a politically unfair redistribution of congressional seats. **Id.** at 656, 658. After an extensive analysis, the court rejected this contention, concluding that "[t]he data suggests that the *Hastert* plan is likely to yield a distribution of seats across party lines that mirrors the statewide

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[26]The 1981 court order which reapportioned Illinois' congressional districts in accordance with the 1980 decennial census results created three "super-majority" African-American congressional districts; namely, the First, Second and Seventh Congressional districts. *See* **Hastert**, 777 F. Supp. at 646-47 (*citing* **In re Congressional Dists. Cases**, No 81 C 3915, slip op. (N.D. Ill. Nov. 23, 1981)). These districts contained the sixty-five percent (65%) minority population and sixty percent (60%) voting age population generally regarded as the necessary threshold for creating a "safe" minority district. **Id.** at 647-48 & n.22.

The proposed *Hastert* and *Rosebrook* plans each retained these three majority African-American congressional districts, despite the "major demographic changes during the 1980's" that necessitated "radical alterations in the configuration of the existing minority districts." **Hastert**, 777 F. Supp. at 646 n.19. The three super-majority African-American districts were retained as a result of bipartisan agreement. *See* **id.**

The **Hastert** court ultimately concluded that the proposed *Hastert* plan better addressed fairness concerns for minority voting power because its allocation of the African-American population within the three super-majority congressional districts more closely comported with the 65%-60% threshold than the *Rosebrook* plan's allocation. **Hastert**, 777 F. Supp. at 648, 655. The court likewise concluded that the *Hastert* plan, which created an Hispanic majority district with a 65.03% total and 59.18% voting age Hispanic population, was "marginally superior" to the *Rosebrook* plan, which contain an Hispanic majority district with corresponding concentrations of 65.00% and 59.15%. **Id.** at 651, 655.

[27]After the 1990 election, the Democrat members of the Illinois congressional delegation outnumbered their Republican counterparts fifteen (15) to seven (7).

partisan makeup of the voting citizenry . . . ." **Id.** at 659. It further concluded that the *Hastert* plan was politically more fair. **Id.**

B. The Court's Section 2 Voting Rights Act Analysis

As previously established, all of the parties initially agreed that Section 2 of the Voting Rights Act "mandated" the creation of an Hispanic majority district and further agreed to the general configuration of such a district. As a result, the proposed configurations of the Hispanic district in the *Hastert* and *Rosebrook* plans were virtually identical: the district would link the two densely populated Hispanic communities on Chicago's near northwest and near southwest sides though a narrowly drawn, C-shaped connector that wound around the western edge of the Seventh Congressional District.[28] The **Hastert** court concluded that the proposed Hispanic district had an "extraordinary appearance" that was "not unlike a Rorschach blot turned on its side."[29] **Hastert**, 777 F. Supp. at 648 n.24. Even though all of the parties agreed to this extraordinary configuration, the court declined to "accept this conclusion without scrutiny." **Id.** at 648. It therefore undertook to determine whether Section 2 of the Voting Rights Act required the creation of an Hispanic majority district.

A minority group seeking the creation of a majority-minority district under Section 2 must "make a threshold showing that it is: (1) sufficiently large and geographically compact to

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[28]The two Hispanic enclaves were separated by the Seventh Congressional District, which runs in a roughly east-west direction along Chicago's central latitudes from Lake Michigan to the western suburbs. **Hastert**, 777 F. Supp. at 648 n.24.

[29]It further observed that the proposed configuration of the Hispanic Fourth Congressional District made the "bizarre" configuration of New Jersey's 1982 congressional reapportionment plan in **Karcher v. Daggett**, 462 U.S. 725, 744-65, 103 S. Ct. 2653, 2667-78 (1983) (Stevens, J., concurring), appear "acceptable by comparison." **Id.**

constitute a majority in a properly drawn district; (2) politically cohesive; and (3) that racial bloc voting typically frustrates the election of the minority group's preferred candidate." **Hastert**, 777 F. Supp. at 649 (*citing* **Gingles**, 478 U.S. at 50-51, 106 S. Ct. at 2766). The court determined that the Chicago/Cook County Hispanic community satisfied each of these threshold requirements.

The court made the following findings of fact to support its conclusion that the Chicago/Cook County Hispanic community was "sufficiently large and geographically compact to constitute a single district majority." **Hastert**, 777 F. Supp. at 649. First, the 1990 census reported the Hispanic population in Chicago at 545,852, a 29.33% increase over the 1980 total. **Id.** Second, "[m]ost of the Chicago/Cook County Hispanic population is clustered in two dense enclaves, one on Chicago's near northwest side and one on the near southwest side." **Id.** Third, the two enclaves are less than one mile apart at their closest point. **Id.** Fourth, this separation resulted from exogenous physical and institutional barriers -- specifically, the east-west Eisenhower Expressway, the University of Illinois-Chicago Circle campus, and various major medical institutions -- and thus did not indicate the existence of two distinct communities. **Id.** & n.25.

To support its conclusion that the Chicago/Cook County Hispanic community was politically cohesive, the court adopted the findings of cohesiveness made by two federal courts in the early 1980s in cases where the Hispanic community challenged discriminatory redistricting practices at the state and local levels. **Hastert**, 777 F. Supp. at 650 (*citing* **Ketchum v. Byrne**, 740 F.2d 1398 (7th Cir. 1984), *cert. denied* 471 U.S. 1135, 105 S.Ct. 2673 (1985) (Chicago aldermanic redistricting plan); **Rybicki v. State Bd. of Elections**, 574 F. Supp. 1082 (N.D. Ill. 1982) (three judge panel) (state legislative redistricting plan), *supplemented* 574 F.Supp. 1147 (N.D.Ill.), *supplemented* 574 F. Supp. 1161 (N.D. Ill. 1983)). The court further found that the voting bloc patterns of the Hispanic community also demonstrated its political cohesiveness. **Id.** More specifically, the court found that

"[s]ingle and bivariate regression analysis of voting patterns in Chicago precincts demonstrate significant ethnic bloc voting patterns." Id. Finally, the court found that the third threshold factor was fulfilled because the paucity of Hispanic officials in city and state-wide elected political offices compelled "the finding that ethnic bloc voting patterns have thwarted the political interests of the Hispanic community." Id.

Having found the three threshold requirements satisfied, the court then considered the merits of the claimed need for an Hispanic majority-minority district under "the totality of the circumstances test." Hastert, 777 F. Supp. at 649. The relevant factors generally considered under the totality of the circumstances test include

> a history of official discrimination relating to minority political participation; the extent of racially polarized voting practices; the extent to which certain voting practices and procedures with discriminatory effects have been employed in the past; the exclusion of the minority group from the candidate slating process; the extent to which the minority group bears the effects of past discrimination in education, employment and health services which hinder their ability to effectively participate in the political process; the use of racial appeals in political campaigns; the extent to which minorities have been elected to office; and the lack of responsiveness by elected officials to particular minority needs.

Id. (citations omitted). However, rather than making its own findings of fact with respect to these factors, the court adopted the Seventh Circuit's findings concerning the Chicago Hispanic community set forth in Ketchum v. Byrne, the Section 2 Voting Rights Act challenge of the 1982 Chicago aldermanic redistricting plan. Id. Based on a "judicially recognized history of discrimination, both past and present, against the Chicago Hispanic community and its attendant impact on effective political

participation and representation," the **Hastert** court concluded that an Hispanic majority district was warranted under **Gingles**. **Id.** The court further concluded that the "odd configuration" of the majority-minority Hispanic Fourth Congressional District was necessary to accommodate the creation of the Hispanic and the three African-American majority-minority districts "dictated under the Voting Rights Act." **Id.** The court therefore concluded that "the configuration has been drafted to *satisfy* constitutional and statutory goals and principles." **Id.** (emphasis in original).

IV. King's Constitutional Challenge of the Hastert Court's Decision

As previously established, King contends that the boundaries of the majority Hispanic Fourth Congressional District were drawn on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. The idea that a legislative redistricting plan that segregated the electorate on the basis of race might violate the Equal Protection Clause first surfaced in the 1960s. *See* **Gomillion v. Lightfoot**, 364 U.S. 339, 349, 81 S. Ct. 125, 131 (1960) (Whittaker, J., concurring) (plan to redefine city's borders to place Negro voters outside of city limits was an unlawful segregation of citizens on basis of race in violation of the Equal Protection Clause); **Wright v. Rockefeller**, 376 U.S. 52, 56, 84 S. Ct. 603, 605 (1964) (congressional redistricting plan that allegedly segregated eligible voters by race and place of origin was challenged as a violation of the Equal Protection Clause). The Supreme Court, however, did not formally recognize an Equal Protection Clause challenge to redistricting plans until its 1993 decision in **Shaw v. Reno**, ___ U.S. ___, 113 S. Ct. 2816 (1993), where it recognized a claim challenging the constitutionality of a bizarrely drawn but facially race-neutral redistricting plan. Two years later in **Miller v. Johnson**, ___ U.S. ___, 115 S. Ct. 2475 (1995), the Supreme Court further defined the contours of this Equal Protection Clause claim. Since **Shaw** and **Miller** were both decided after **Hastert**, the **Hastert** court did not have occasion to consider whether the extraordinary configuration of the Fourth Congressional District

may have violated the Equal Protection Clause. Accordingly, the **Hastert** court's conclusion that the district's extraordinary configuration was necessary to "satisfy constitutional principles" is rendered circumspect by the change in governing law and is therefore subject to *de novo* review.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." **U.S. Const., Amdt. 14, §1**. The clause's "central mandate is race neutrality in governmental decisionmaking." **Miller**, ___ U.S. at ___, 115 S. Ct. at 2482. The prohibitions of the Equal Protection Clause extend not only to laws that explicitly distinguish between individuals on the basis of race but also to laws that appear racially neutral but are "unexplainable on grounds other than race." **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2824, 2825 (*quoting* **Arlington Heights v. Metropolitan Housing Dev. Corp.**, 429 U.S. 252, 266, 97 S. Ct. 555, 564 (1977)); *accord* **Miller**, 115 S. Ct. at 2483. Although application of the Equal Protection Clause's mandate is often difficult, "the basic principle is straightforward: 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'"[30] **Miller**, ___ U.S. at ___, 115 S. Ct. at 2482 (*quoting* **Regents of**

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[30]The Supreme Court has never held that "race-conscious state decisionmaking" is impermissible in all circumstances. **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2824, 2826. The **Miller** Court further explained:

> A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. '[W]hen members of a racial group live together in a community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.' *Shaw*, *supra*, at ___, 113 S. Ct. at 2836. But where the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates. *Id.* at ___, 113 S. Ct. at 2827; . . . .

Miller, ___ U.S. at ___, 115 S. Ct. at 2490.

Univ. of Cal. v. Bakke, 438 U.S. 265, 291, 98 S. Ct. 2733, 2748 (1987)). Laws that classify citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieve a compelling state interest. **Id.** (citations omitted); **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2825.

In **Shaw**, the Supreme Court held that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." ___ U.S. at ___, 113 S. Ct. at 2828. The appearance of the reapportioned district is therefore an important factor in ascertaining whether the electorate was impermissibly segregated on the basis of race. **Id.** at ___, 113 S. Ct. at 2827 ("appearances do matter" in redistricting).

The **Hastert** court readily observed that the majority Hispanic Fourth Congressional District was bizarrely configured and "resembled a Rorschach blot turned on its side." 777 F. Supp. at 648 n.24. Although the **Hastert** court is presumed to have acted constitutionally in issuing its reapportionment order, *see* **United States v. Paradise**, 480 U.S. 149, 183, 107 S. Ct. 1053, 1073 (1987);[31] *see also* **Miller**, ___ U.S. at ___, 115 S. Ct. at 2488 (until a claimant makes a showing sufficient to support an allegation of race-based districting, the court must presume that

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[31] In **Paradise**, the Court stated:

> We must acknowledge the respect owned a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment. A district court has 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

480 U.S. at 183, 107 S. Ct. at 1073 (*quoting* **Louisiana v. United States**, 380 U.S. 145, 154, 85 S. Ct. 817, 822 (1965)).

the legislature acted in good faith), the presumption is necessarily limited by the scope of the court's constitutional analysis. Since the **Hastert** court did not analyze whether the oddly drawn Fourth Congressional District met the requirements of the Equal Protection Clause, a presumption of constitutionality does not arise and no deference is accorded to the **Hastert** court on this issue.

There is no dispute that the **Hastert** court considered race and ethnicity in its attempt to further the goals of the Voting Rights Act.[32] **Hastert**, 777 F. Supp. at 650-51. The question is whether in attempting to remedy a Section 2 Voting Rights Act violation, the **Hastert** court adopted a redistricting plan that apportioned the electorate on the basis of race and ethnicity in violation of the Fourteenth Amendment's Equal Protection Clause. Accordingly, the extraordinarily configured Fourth Congressional District must be subjected to an Equal Protection Clause analysis to determine its constitutionality.

A. Standards for Equal Protection Clause Analysis of Redistricting Plan

"The essence of [the] Equal Protection Clause claim recognized in **Shaw** is that the State has used race as a basis for separating voters into districts." **Miller**, ___ U.S. at ___, 115 S. Ct. at 2485. When the State uses race in this manner, it has engaged in racial gerrymandering (*i.e.*, "the deliberate and arbitrary distortion of district boundaries . . . for racial purposes"). *See* **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2823 (*citing* **Davis v. Bandemer**, 478 U.S. 109, 164, 106 S. Ct. 2797, 2826 (1986) (Powell, J., concurring in part and dissenting in part)). To determine whether a redistricting plan has been racially gerrymandered, the court must focus on the role that race played

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[32]The court specifically acknowledged that "[r]acial and ethnic considerations are appropriate to drawing districts to advance the goals of the Voting Rights Act." **Hastert**, 777 F. Supp. at 650-51 (*citing* **United Jewish Org. of Williamsburgh, Inc. v. Carey**, 430 U.S. 144, 97 S. Ct. 996 (1977)).

in the drawing of the district's borders. The court, however, does not make this assessment in a vacuum.

1. Determining the Role of Race in the Redistricting Plan

The court's analysis begins by recognizing two fundamental principles of redistricting. First, race is one of many demographic factors inherently considered in the redistricting process. As the Supreme Court observed in **Shaw**,

> redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors.

___ U.S. at ___, 113 S. Ct. at 2826; **Miller**, ___ U.S. at ___, 115 S. Ct. at 2487. Second, legislatures also generally consider "traditional districting principles" -- compactness, contiguity, and respect for both political subdivisions and communities of shared interests -- in deciding how to reapportion district boundaries. The court's task is to isolate the role that race played in redistricting vis-a-vis the traditional race-neutral districting principles and other non-racial demographic factors. The court's undertaking is difficult in and of itself;[33] it is only made harder by the complex interplay of forces that enter a legislature's redistricting calculus. **Miller**, ___ U.S. at ___, 115 S. Ct. at 2488. In the end, however, only two conclusions are possible: first, race was the predominate consideration that guided the creation of the

[33]"The distinction between being aware of racial considerations and being motivated by them may be difficult to make." **Miller**, 115 S. Ct. at 2487.

district; or second, race was but one of many factors of equal or greater weight that guided the creation of the district.[34]

If the court determines that race played the predominate role in drawing the district's boundaries, then the redistricting plan was racially gerrymandered. *See* **Miller**, ___ U.S. at ___, 115 S. Ct. at 2488-90; **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2824-28. Race plays the predominate role when the legislature has subordinated all other considerations, including the race-neutral traditional districting principles (*i.e.*, compactness, contiguity, and respect for both political subdivisions and communities of shared interests), to racial considerations in determining the district's configuration. **Id.** On the other hand, if the court determines that race was merely one factor among many other race-neutral factors accorded equal or greater significance by the legislature in drawing the district's boundaries, then race was not the predominate factor and the redistricting plan is not subject to strict scrutiny. *See* **Miller**, ___ U.S. at ___, 115 S. Ct. at 2488 ("where these [traditional districting principles] or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can 'defeat a claim that a district has been gerrymandered on racial lines'") (*quoting* **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2827); **DeWitt v. Wilson**, 856 F. Supp. 1409, 1415 (E.D. Cal. 1994) ("we conclude that in the context or redistricting, where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, that strict scrutiny is not required"), *aff'd in part and appeal dismissed in part* ___ U.S. ___, 115 S. Ct. 2637 (1995). In this manner, the traditional race-neutral districting principles function as "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2827.

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[34]One could argue that the presence of racially polarized voting represents a prior determination by the electorate that race overrides other issues in the political algebra of the community.

A district does not need to be bizarrely shaped to warrant constitutional review. *See* **Miller**, ___ U.S. at ___, 115 S. Ct. at 2486. According to the Supreme Court,

> Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.[35]

Id. Rather, parties may rely on evidence other than bizarreness to establish race-based districting. **Id.** (citations omitted).

The party challenging the district's constitutionality has the burden of persuasion to prove "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." **Miller**, ___ U.S. at ___, 115 S. Ct. at 2488. The predominance of race in redistricting may be shown "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to the legislative purpose." **Id.** In sum,

> a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political

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[35]The **Miller** Court later reiterated this point:

> In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof of evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness.

___ U.S. at ___, 115 S. Ct. at 2488.

subdivisions or communities defined by actual shared interests, to racial considerations.

Id.

2. Strict Scrutiny

Once a plaintiff has proven that racial considerations predominated, the court must subject the redistricting plan to strict scrutiny -- the "most rigorous and exacting standard of constitutional review." **Miller**, ___ U.S. at ___, 115 S. Ct. at 2490. There are two prongs to this examination: first, the racial classification must be justified by a compelling governmental interest; and second, the means chosen by the State must be narrowly tailored to achieve that goal. **Wygant v. Jackson Bd. of Educ.**, 476 U.S. 267, 274, 106 S. Ct. 1842, 1847 (1986) (plurality opinion) (citations omitted). Thus, to satisfy strict scrutiny, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." **Miller**, ___ U.S. at ___, 115 S. Ct. at 2490 (*citing* **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2829-2832; **City of Richmond v. J.A. Croson & Co.**, 488 U.S. 469, 494, 109 S. Ct. 706, 722 (1989) (plurality opinion); **Wygant**, 476 U.S. at 274, 280 & n.6, 106 S. Ct. at 1847, 1850 & n.6 (plurality opinion); *cf.* **Adarand Constructors, Inc. v. Pena**, ___ U.S. ___, 115 S. Ct. 2097, 2114 (1995)). Accordingly, once strict scrutiny is required, the burden shifts to the State defendants to prove that the racially drawn district is justified. *See* **Miller**, ___ U.S. at ___, 115 S. Ct. at 2490 (*citing* **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2839-32); **Vera v. Richards**, 861 F. Supp. 1304, 1336 (S.D. Tex. 1994), *cert. granted* ___ U.S. ___, 115 S. Ct. 2639 (1995); *but see* **Shaw v. Hunt**, 861 F. Supp. 408, 435-36 (E.D.N.C. 1994), *cert. granted* ___ U.S. ___, 115 S. Ct. 2639 (1995).[36]

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[36]In **Shaw v. Hunt**, the district court on remand (from **Shaw v. Reno**) recognized a distinction between the burdens of production and of proof in a strict scrutiny analysis. The court reasoned that once a plaintiff proved that race was the predominate consideration and thereby triggered a strict scrutiny analysis, the burden of *production* shifted to the State to demonstrate that its use

of race was justified by a compelling governmental interest. *See* **Shaw**, 861 F. Supp. at 435-36. However, the court concluded that the plaintiff at all times retained the ultimate burden of *persuasion* to establish the constitutional violation; as such, the plaintiff had the burden to prove that the State's use of race was not narrowly tailored to accomplish the asserted compelling interest. **Id.** This ruling has been appealed to the Supreme Court.

Although not explicitly stated, the defendant-intervenors agree with the district court's conclusion in **Shaw** on remand. (*See* DOJ Post-Trial Mem., at 3). The defendant-intervenors, like the **Shaw** court on remand, rely on Justice O'Connor's concurrence in **Wygant** to support their position. In **Wygant**, a plurality of Justices held that racially based lay-off preferences contained in a collective bargaining agreement violated the Equal Protection Clause. In her concurrence, Justice O'Connor wrote in pertinent part:

> [I]t is incumbent upon the [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [defendants'] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan was not sufficiently 'narrowly tailored.' Only by meeting this burden [can] the plaintiffs establish a violation of their constitutional rights.

476 U.S. at 293, 106 S. Ct. at 1857 (O'Connor, J., concurring). The other Justices forming the Court's plurality, Chief Justice Burger and Justices Powell and Rehnquist, did not adopt this burden-shifting regimen but instead concluded only that "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program." **Id.** at 277-78, 106 S. Ct. at 1849.

This court declines to follow the burden-shifting approach (reminiscent of Title VII cases) advocated by Justice O'Connor in **Wygant** and adopted by the **Shaw** court on remand. First, the **Shaw** court on remand allocated the burden of proof without the benefit of the Supreme Court's decision in **Miller**. As previously noted, the **Miller** Court concluded that the "State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." The **Miller** Court thus imposed upon the State the dual burdens of demonstrating that a compelling state interest existed *and* that the challenged redistricting plan was "narrowly tailored" to accomplish that interest. This court will follow **Miller**, the controlling law at this time. *See also* **Bernal v. Fainter**, 467 U.S. 216, 227, 104 S. Ct. 2312, 2319 (1973) ("[t]o satisfy strict scrutiny, the State must show that [the challenged statute] furthers a compelling state interest by the least restrictive means practically available"); **In re Griffiths**, 413 U.S. 717, 721-22, 93 S. Ct. 2851, 2855 (1973) ("In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."). Second, Justice O'Connor, writing for the Court in **Adarand**, acknowledged "[t]he Court's failure to produce a majority opinion in *Bakke*, *Fullilove* and *Wygant* left unresolved the proper analysis for remedial race-based

3. Subjecting a Court's Redistricting Order to Strict Scrutiny

The above standards notwithstanding, the defendant-intervenors argue that a court-ordered redistricting plan should not be subjected to strict scrutiny where, as in **Hastert**, the plan is imposed to remedy a constitutional or statutory violation. The defendant-intervenors contend in this regard that the Supreme Court's decisions in **Shaw** and **Miller** do not apply to this case because those decisions involved constitutional challenges to *legislatively* created congressional redistricting plans rather than a *court*-ordered redistricting plan. This distinction is without merit for three reasons.

First, the Supreme Court has historically recognized that in some respects, court-ordered remedial redistricting plans must be subject to stricter review than plans drawn by state legislatures. *See* **Upham v. Seamon**, 456 U.S. 37, 42, 102 S. Ct. 1518, 1521-22 (1982) (per curiam); **Wise v. Lipscomb**, 437 U.S. 535, 540, 98 S. Ct. 2493, 2497 (1978); **Connor v. Finch**, 431 U.S. 407, 414-15, 97 S. Ct. 1828, 1833-34 (1977). These courts have employed a more stringent standard to review court-ordered redistricting plans because reapportionment is a uniquely legislative task for which the court is not ideally suited. *See* **Connor**, 431 U.S. at 414-15, 97 S. Ct. at 1833-34. There, the Supreme Court explained:

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government action." **Adarand**, ___ U.S. at ___, 115 S. Ct. at 2109. Finally, as a matter of policy, the State should bear the burden of proof once strict scrutiny is required since it is the State, and not the private litigant, that is promoting racially based action with all of its attendant harms. *See, e.g.*, **Miller**, ___ U.S. at ___, 115 S. Ct. at 2486 (outlining potential harms of racially gerrymandered redistricting plans); **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2827-28 (same); **Wygant**, 476 U.S. at 273, 106 S. Ct. at 1846 ("This court has 'consistently repudiated distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'") (*quoting* **Loving v. Virginia**, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823 (1967)).

> Legislative reapportionment is primarily a matter for legislative consideration and determination, . . . for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. Where a legislature has failed to reconcile these conflicting state and federal goals, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly and in a manner *'free from any taint of arbitrariness or discrimination.'*

Id. at 415, 97 S. Ct. at 1834 (citation omitted) (emphasis added); *accord* **Wise**, 437 U.S. at 540, 98 S. Ct. at 2497.[37] However, the stricter standard for court-ordered reapportionment plans applies "only to remedies required by the nature and scope of the violation. 'The remedial powers of an equity court must be adequate to the task, but they are not unlimited.'" **Upham**, 456 U.S. at 42, 102 S. Ct. at 1522 (*quoting* **Whitcomb v. Chavis**, 403 U.S. 124, 161, 91 S. Ct. 1858 (1971)). Thus, the legislative versus judicial distinction advocated by the defendant-intervenors is of no consequence where, as in **Hastert**, a court adopted a redistricting plan to remedy a constitutional or statutory violation.

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[37]"Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan pending later legislative action. In discharging this duty, the district courts 'will be held to stricter standards than will a state legislature.'" **Wise**, 437 U.S. at 540, 98 S. Ct. at 2497 (*quoting* **Connor**, 431 U.S. at 424, 97 S. Ct. at 1833).

Such a court-ordered plan must be strictly scrutinized to ensure that the remedy itself is appropriate and constitutional.[38]

Second, where a State legislature has abdicated its redistricting duty to the court system, the courts are forced to act in a pseudo-legislative capacity. If a lesser standard is applied to court-ordered redistricting plans under these circumstances, the checks and balances inherent in our constitutional framework will be gravely injured in this discrete area. Subjecting a court-ordered plan to strict scrutiny is thus necessary to restore constitutional equipoise. In addition, applying the same standards to both court-ordered and legislatively created redistricting plans is further warranted by the disturbing and growing trend of gross dereliction of duty by State legislatures that are all too ready to leave the political thicket of redistricting to the federal courts.[39] Applying a lesser standard to a court-ordered redistricting plan would only reward such cowardice and encourage more state legislatures to forsake their duties and seek political refuge behind the court's robes. Protecting the integrity of the court requires application of an equal standard of review where, as here, the court is forced by

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[38]The Democratic National Committee argues in its *amicus* brief that the Supreme Court has historically distinguished between court-ordered and legislative plans, citing two examples: first, unlike redistricting plans drawn by state or local governments subject to §5 of the Voting Rights Act, 42 U.S.C. §1973c, remedial redistricting plans adopted by a federal court do not need to receive preclearance from the Attorney General or a special three-judge federal court in the District of Columbia; and second, "when a federal court must devise its own remedial plan, it is necessary to determine whether the proposed remedial plan is 'court ordered' or 'legislative', to determine whether at-large districts may be included." (DNC Mem., at 10-11). Notwithstanding the facts that the theory underpinning the first example is falsifiable since §5's preclearance requirements do not apply to all State legislatures and that the second example implicitly recognizes that a court can act in a legislative capacity in fashioning a redistricting plan, the DNC's position is positively unavailing in light of the Supreme Court's pronouncements in **Upham**, **Wise**, and **Connor** (none of which was properly cited in the DNC's brief).

[39]State legislatures in California, Florida, Illinois (repeatedly), and most recently Georgia, among others, have inexcusably abandoned their constitutional redistricting duties to the courts.

legislative nonfeasance to perform what is a uniquely legislative task.

Third, the Supreme Court in **Adarand** most recently held that all racial classifications imposed by any governmental actor -- whether federal, state or local -- must be analyzed by a reviewing court under strict scrutiny. ___ U.S. at ___, 115 S. Ct. at 2117. Justice O'Connor, writing for the Court, observed that the Court's prior decisions through **Croson** had established three general propositions with respect to governmental racial classifications:

> First, skepticism: '[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.' Second, consistency: 'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification . . . *i.e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: '[e]qual protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment.'

Adarand, ___ U.S. at ___, 115 S. Ct. at 2111 (citations omitted). Justice O'Connor concluded:

> Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that *any governmental actor* subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.

Id. (emphasis added). Although **Adarand** did not involve a challenge to a court-ordered racial classification, the scope of the Court's conclusion must be extended to include the judicial branch. See, *e.g.*, **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2832

("Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; . . . . It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny."). Accordingly, strict scrutiny may be applied to court-ordered reapportionment plans drawn predominately on the basis of race.[40]

The defendant-intervenors and Democratic National Committee, as *amicus curiae*, nonetheless argue that a lesser standard of review should be applied to court-ordered remedial redistricting plans, *citing* **DeWitt v. Wilson**, 856 F. Supp. 1409 (E.D. Cal. 1994).[41] This case is both factually and legally distinguishable. In 1991, the California Supreme Court appointed a panel of Masters to develop and recommend a redistricting plan

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[40]In **Croson**, the Supreme Court observed that "[t]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." 488 U.S. at 493, 109 S. Ct. at 721. Citing this language, the defendant-intervenors argue that strict scrutiny is more suited for legislative action than federal court action. While this observation may be generally true, it is not without exception. In **Miller**, the Court concluded that a plaintiff could establish that racial considerations predominated either through circumstantial evidence of shape and demographic factors or through direct evidence of the legislature's purpose. ___ U.S. at ___, 115 S. Ct. at 2488. Given these differing methods of proof, strict scrutiny would not "entail the in-depth examination of the federal court that ordered the plan" envisioned by the defendant-intervenors where a plaintiff relies on circumstantial evidence to challenge the court-ordered redistricting plan. In fact, it has already been determined in **Johnson v. Mortham**, that a court-ordered remedial congressional redistricting plan adopted in 1992 will be subjected to strict scrutiny under the standards articulated in **Miller**. *See* **Johnson**, ___ F. Supp. ___, 1995 WL 707856 (N.D. Fla. Nov. 20, 1995) (discussed in footnote 18 *supra*).

[41]The United States Supreme Court summarily affirmed the decision in **DeWitt**
on the same day that it issued its decision in **Miller v. Johnson**. *See* ___ U.S. ___, 115 S. Ct. 2637 (1995) (affirming **DeWitt** in part and dismissing the appeal in part).

after the governor vetoed the legislature's reapportionment plan and legislative malaise set in. 856 F. Supp. at 1410. The Masters conducted public hearings and submitted a report and recommendation to the California Supreme Court, which the Supreme Court adopted. **Id.** (*citing* **Wilson v. Eu**, 1 Cal. 4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (1992)). A California registered voter subsequently challenged the court-ordered redistricting plan, claiming that it "relied on race-conscious reapportionment and diluted white voter strength in violation of the Equal Protection Clause of the Fourteenth and Fifteenth Amendments." **Id.** The district court granted summary judgment for the State, concluding that the redistricting plan did not fall within the parameters of **Shaw v. Reno**.

The **DeWitt** court, citing with approval the California Supreme Court's findings in **Wilson v. Eu**, concluded that "[n]o bizarre boundaries were created" and that "the Master's Report sought to balance the many traditional redistricting principles, including the requirements of the Voting Rights Act." 856 F. Supp. at 1413. The court framed the issue as follows:

> This case . . . involves the constitutionality of a redistricting plan that created majority-minority districts in a manner that was consistent with traditional redistricting principles, not based solely on race, and not involving extremely irregular boundaries. It involves the question left open by the Court in *Shaw*.

Id. The **DeWitt** court concluded that the plaintiff failed to state a claim for racial gerrymandering because

> [t]he Masters did not draw district lines based deliberately and solely on race, with arbitrary distortions of district boundaries. The Masters . . . properly looked at race, not as the sole criteria in drawing lines but as one of the many factors to be considered. We agree with the California

> Supreme Court that the Masters' Report evidences a judicious and proper balancing of the many factors appropriate to redistricting . . . .

Id. It further held that "in the context of redistricting, where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, . . . strict scrutiny is not required." **Id.** at 1415.

The Democratic National Committee reasons that since the Supreme Court summarily affirmed the decision in **DeWitt** on the same day that it decided **Miller v. Johnson**, it must have intended not to subject the court-ordered redistricting plan to the "predominant use of race test" announced in **Miller**. The DNC therefore speculates that if the Supreme Court had intended to subject a court-ordered plan to the same strict scrutiny applied in **Miller** to a legislatively enacted redistricting plan, the Court would have vacated the **DeWitt** decision and remanded it for further proceedings in light of **Miller**. Such a speculative inference is patently unreasonable given the **DeWitt** court's express findings that traditional race-neutral districting principles were not subordinated to racial considerations in the redistricting process. To the contrary, a much more reasonable (and indeed more probable) inference to be drawn from the timing and texts of the **Miller** and **DeWitt** decisions is that the **Miller** Court implicitly recognized the facts and holding of **DeWitt** when it wrote:

> Where these [traditional districting principles] or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can 'defeat a claim that a district has been gerrymandered on racial lines.'

Miller, ___ U.S. at ___, 115 S. Ct. at 2488 (*citing* **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2827). **DeWitt** does not establish that court-ordered redistricting plans avoid strict scrutiny; rather, it completes the rule announced in **Shaw** and **Miller**. That is, strict

scrutiny will only apply where racial considerations predominate over traditional race-neutral districting principles.

This court therefore concludes that since racial considerations predominated over all other factors in the configuration of the Fourth Congressional District adopted by the **Hastert** court (*see infra* section IV.B), the court-ordered plan must be subject to strict scrutiny.

B. Racial Considerations Predominated in Configuring the Fourth Congressional District

The Supreme Court in **Miller** identified two means of establishing that race predominated over all other considerations in the drawing of district boundaries; namely, circumstantial evidence of a district's shape and demographics or direct evidence of the legislative purpose. Since the Illinois General Assembly did not create the majority-minority Hispanic Fourth Congressional District, King's only apparent recourse was to prove that the **Hastert** court adopted a racially based redistricting plan through circumstantial evidence. Establishing that racial considerations predominated over all of the other complex factors involved in redistricting through indirect, inferential evidence is an extremely difficult burden under any set of circumstances. Establishing that race predominated in a *court-ordered* redistricting plan would normally make this burden exponentially more difficult. Three factors, however, eased rather than enhanced the difficulty of King's burden: first, the **Hastert** court employed a unique process to select a redistricting plan; second, the **Hastert** court found that the Fourth Congressional District was bizarrely configured; and third, the **Hastert** court did not make any findings of fact to explain how and why the district's boundaries came to have such a bizarre configuration. The interplay of these three factors enabled King to fulfill his burden.

1. The Unique Process of Selecting a Redistricting Plan[42]

At the onset of the consolidated **Hastert** proceedings, the various litigants presented six different reapportionment plans to the court for consideration. Due to significant time constraints, the court did not have the option of bifurcating the proceedings to separately decide the legal issues (*e.g.*, the constitutionality of the existing plan; whether Section 2 of the Voting Rights Act required the creation of an Hispanic majority district) and the appropriate remedy. The court thus was unable to conduct hearings (or appoint a Master to do the same) to consider the merits and constitutionality of each of these submitted plans. The court instead adopted streamlined discovery and trial procedures which facilitated and condoned the pre-trial resolution of disputed issues by the litigants. Two of these pre-trial agreements are particularly important to this analysis: first, the parties universally agreed that population and demographic changes "mandated the creation of an Hispanic majority district;" and second, the parties agreed in principle to the configuration of the proposed Hispanic district. As a result of other pre-trial agreements, the parties revised and eliminated competing redistricting plans until only two remained for the court's consideration. The court's primary task at trial was thus narrowed to determining which of these two revised plans better met constitutional and statutory requirements. Since the configuration of the Fourth Congressional District was virtually the same regardless of which proposed plan the court adopted, the district's bizarre shape was effectively determined by the *litigants* and not the court.[43] Under these circumstances, the litigants'

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[42]Although this court has previously set-forth a detailed summary of the **Hastert** court proceedings, *see supra* part III, the **Hastert** court's methodology bears repeating to demonstrate more precisely the consequences of that methodology on this court's decision.

[43]While it is true that the **Hastert** court affected the shape of the Fourth Congressional District by selecting the proposed *Hastert* plan over the *Rosebrook* plan, the demonstrable impact of that choice on the configuration of the district's boundaries was *de minimis*. The **Hastert** court thus did not understate the impact of the parties' pre-trial agreement on district's configuration when it observed

intentions and purpose become an important source of information on the role that race played in the configuration of the boundaries' borders.[44]

2. The Bizarrely Drawn District

The Fourth Congressional District is an uncouth configuration: a Rorschach ink blot turned on its side; a wobbly eighth note; an unusually shaped bar-bell. However it is characterized, its shape is bizarre. The District's extremely irregular configuration creates a strong inference (but not a presumption) that its shape rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race. *See, e.g.*, **Miller**, ___ U.S. ___, 115 S. Ct. at 2486 (shape may be persuasive circumstantial evidence that race for its own sake was the dominant rationale in the drawing of district lines); **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2826-2828; **Johnson v. Mortham**, ___ F. Supp. ___, 1995 WL 707856, at *20 (N.D. Fla. Nov. 20, 1995) (evidence of bizarre configuration by 'tself was sufficient to establish racial gerrymander).

3. The Lack of Findings of Fact by the Hastert Court

An important effect of the streamlined **Hastert** pre-trial and trial procedures was the transfer of many of the court's fact finding responsibilities to the parties. As a result of these

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that this agreement may have been "the crucial factor in facilitating the creation of an Hispanic district."

[44]The defendant-intervenors caution against relying extensively on such evidence because the court ultimately selected the plan and its motivations for doing so may have differed substantially from the drafters' intentions. This court will defer to the reasons expressed in the **Hastert** opinion concerning why that court adopted the proposed *Hastert* plan over the proposed *Rosebrook* plan. Where, however, the **Hastert** court did not make any specific findings that contradict or undermine the expressed intent of the litigants, this court will consider evidence relating to their intent.

streamlined procedures, a significant part of the evidentiary portion of the trial was eliminated through stipulation. The **Hastert** court frequently acknowledged that the parties had resolved complex issues via stipulation but the court failed to address or recite the factual predicate underpinning the stipulations. While this practice may have been appropriate under the pressing time constraints in 1991, it has had the collateral effect of limiting the factual record upon which this court must rely to evaluate King's claim.

This court's task is to determine what role racial considerations played in the configuration of the Fourth Congressional District's boundaries. In doing so, this court is confined to the factual determinations made by the **Hastert** court as set forth in that court's opinion. This court cannot retroactively supplement the **Hastert** court's factual record. As such, unless the **Hastert** court made a specific finding (*e.g.*, socio-economic factors were considered in drawing the district's boundaries), the default rule must be that the **Hastert** court did not consider the role that the particular factor played in the district's bizarre configuration. This default rule is required to ensure that the court-ordered redistricting plan is "free from any taint of arbitrariness or discrimination." *See* **Connor**, 431 U.S. at 415, 97 S. Ct. at 1834.

4. Application

Almost from the outset of the **Hastert** litigation, the litigants agreed to create an Hispanic majority-minority district. This agreement is not, however, sufficient to establish that racial considerations predominated over all other factors in the creation of the district's actual borders. The focus here is not on the justifications supporting the creation of an Hispanic majority district but rather on how the specific boundaries of the Fourth Congressional District came to be drawn. While the **Hastert** opinion provides a broad perspective on the factors facilitating the adoption of the Hispanic district, the court did not make any specific findings explaining how or why the district's specific

boundaries came to exist. This omission notwithstanding, the only reasonable conclusion that can be drawn from the shape and demographics of the district is that racial considerations predominated over all other factors in the configuration of the Fourth Congressional District.

First, the pragmatic requirements of creating *four* super-majority minority districts located principally within the City of Chicago necessarily forced the map makers to draw district boundaries with race as a major consideration.[45] As the **Hastert** court revealed, the goal of the litigants was to create a new Hispanic majority district while maintaining the three African-American super-majority districts (*i.e.*, the First, Second and Seventh Congressional Districts) created by federal court order in 1981. Substantial demographic changes in the city's minority population during the 1980s made accomplishing this goal a particularly difficult task. While the Hispanic population generally grew, the three majority African-American districts created in 1981 experienced significant losses in population, especially African-American population. *See* **Hastert**, 777 F. Supp. at 646 n.19. In addition, the African-American population generally moved south. **Id.** These demographic changes caused the litigants to "radically alter" the configuration of the three 1981 African-American districts to ensure that an African-American population of 65% or more could be maintained in each of the First, Second and Seventh Congressional Districts.[46] **Id.** Since the city's minority population is finite and the constitutional

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[45]As previously noted, a super-majority African-American district contains an African-American population that represents 65% of the district's total population and 60% of its voting age population. A super-majority Hispanic district contains the same ratios of Hispanic population. According to the **Hastert** court, these population ratios are required to ensure a safe minority congressional seat. 777 F. Supp. at 647 & n.20.

[46]The litigants substantially agreed prior to trial to the reconfiguration of the Second Congressional District, **id.** at 640, and apparently reached an agreement in principle on the reconfiguration of the First and Seventh Congressional Districts, save for the placement of Chicago's politically influential Second Ward.

requirement of one person-one vote unforgiving in its application, the radical alteration of the three African-American super-majority districts necessarily affected the boundaries of the Hispanic majority district. The result was inevitable: a bizarrely drawn Hispanic district whose boundaries were created to maximize its Hispanic population while permitting the African-American super-majority districts with which it shared common borders to maximize their respective African-American populations in order to achieve the desired 65% minority population threshold in each district.[47]

Second, the only factor that consistently explains the precise configuration of the district's boundaries is race. The Defendant-intervenors correctly point out that traditional non-racial districting principles were considered in the configuration of the Fourth Congressional Districts. Affidavits submitted into evidence establish that the litigants, at least at the outset of the **Hastert** litigation, considered factors such as compactness, contiguity, respect for political subdivisions and communities of shared interests in the initial configuration of the Fourth Congressional District. However, it is the degree of consideration, and not the mere fact of consideration, that is crucial.

To a certain extent, the clustering of Hispanics into two densely populated enclaves provided map makers with the luxury of resorting to traditional districting principles. It is not surprising to find that a comparatively small district with two densely packed

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[47]The **Hastert** court acknowledged as much, stating:

> The location of the Chicago Hispanic community in two highly concentrated enclaves on either side of the Seventh Congressional District on Chicago's near northwest and near southwest sides necessarily requires an odd configuration to accommodate the creation of an Hispanic district and the three super-majority African-American districts dictated under the Voting Rights Act.

777 F. Supp. at 650.

minority enclaves is (excluding the connector) more compact and more respectful of political subdivisions than a larger district drawn to capture a more dispersed minority population.[48] District to district comparisons do not, therefore, necessarily inform the court of the role played by traditional districting principles in the configuration of the Fourth Congressional District. Rather, the inquiry must necessarily focus on the manner in which the boundaries are drawn to determine whether a rational pattern emerges to explain the district's configuration on grounds other than race (*e.g.*, do the intricately shaped boundaries follow or cross precinct borders? ward borders? natural or man-made barriers?, *etc.*). If race is considered with other factors of equal or greater weight, the configuration of the district should have some objectively verifiable explanations (*e.g.*, the border in part separates traditionally Democratic and Republican Party electoral

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[48]In the context of assessing the **Gingles** threshold requirements of a §2 Voting Rights Act claim, the **Hastert** court found that the "Chicago/Cook County Hispanic community is sufficiently large and geographically compact to constitute a single district majority." This finding does not establish, however, that the **Hastert** court also found that the district drawn to accommodate this community was compact. For example, a fairly small rectangle can be drawn around the two enclaves on the near northwest and near southwest sides of the city that would include a substantial majority of the Hispanic population within the City of Chicago. This rectangle serves as evidence of the Hispanic community's geographic compactness. The Fourth Congressional District, however, would not fit within the area of this same rectangle: neither the western connector nor the two promontory points jutting out of the district's two core areas fall inside this rectangle. The finding of geographic compactness to satisfy a **Gingles** threshold factor thus does correspond to a separate finding that the Fourth Congressional District was also compact.

The **Hastert** court did not make any findings concerning the compactness of the Fourth Congressional District. Under the default rule previously articulated, this court must conclude that compactness was not considered in the configuration of the Fourth Congressional District. In any event, this court finds that the Fourth Congressional District is not visually compact. *See* **Schrage v. State Bd. of Elections**, 88 Ill. 2d 87, 98, 430 N.E.2d 483, 487 (1981) (recognizing visual inspection as appropriate means for evaluating compactness); **Martin v. Soucie**, 109 Ill. App. 3d 731, 734-35, 441 N.E.2d 131, 133-34 (3d Dist. 1982). In addition, unless the court completely discounts the 4.7% of the district's population dispersed throughout the western connector, the district is not functionally compact either.

strongholds). If an objectively determinable pattern does not emerge based on non-racial districting factors, the only plausible explanation of the district's configuration is race. Alternatively stated, the question is whether racial considerations substantially explain the configuration of the district's borders; if the answer is yes, racial considerations will have predominated.

In this case, a careful analysis of the Fourth District's boundaries establishes that they were drawn to maximize the percentage of Hispanics located within the district.[49] As King's witness Cleveland testified, the lines of the Fourth Congressional District follow the concentrations of the Hispanic population with "exquisite" detail. The district's boundaries were drawn at the census block level, which roughly corresponds to a city block.[50] While the map makers had to use census block data to ensure population equality, the census block data contained racial data at the city block level. This data permitted the map makers to draw

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[49]As adopted in 1991, the Fourth Congressional District has a total population of 571,530; of this amount, Hispanics account for sixty-five (65%) of the total population and fifty-nine (59%) of the voting age population. Over ninety-five percent (95%) of the district's population lives within the two core areas of the district located on the near northwest and near southwest sides of the city. The remaining 4.7% of the district's population lives within the narrow, C-shaped "western" connector that runs around the northern, western and southern borders of the Seventh Congressional District. Central Avenue in the City of Chicago serves as the dividing line between the western connector and the two core areas. The western connector, which contains a significant amount of vacant land, park land, cemeteries and industrial areas, connects the district's northern and southern core areas and thereby serves as a land bridge to ensure the district's contiguity.

This contiguity, however, is "hypertechnical[] and . . . cynical[]," *see* **Hays v. State of Louisiana**, 839 F. Supp. 1188, 1200 (W.D. La. 1993), since it is preserved through the use of non-populated parks and barren industrial areas.

[50]The 1990 Bureau of Census computer tapes divide census data into different units of aggregation. The most elementary level is the census block, which lists the population, voting age population and racial make-up of each city block. The next level of data aggregation is the census group block, which provides socio-economic data for larger groups composed of multiple census blocks. The district's boundaries do not conform to but rather split at least 150 census group blocks. For this reason, the district cannot have been drawn at the census group block level.

the district's boundaries on a block-by-block basis in order to maximize the concentration of Hispanics within the district. As a result, when a map of the Fourth Congressional District is superimposed over a map showing the concentration of the Hispanic population drawn at the census tract level, the district map "includes virtually all areas of high percent Hispanic concentration on the northern . . . part of the City of Chicago as well as virtually all of the areas of high Hispanic concentration on the southern part of the City of Chicago." (Def. Int. Exh. 12, at 105). The same is true when the exercise is repeated at the census block level based upon the percentage of Hispanic concentration, *see* (Def. Int. Exh. 4, Map 1), and when Latino plurality block groups are considered.[51] (*Id.*, Map 2).

This close correlation is not surprising given the racial demographics of the city discussed earlier. Indeed, the **Hastert** court expressly found that racial considerations dictated the configuration of the two appendages jutting out of the district's two core areas. The court stated in this regard:

> To ensure a sufficient Hispanic concentration within the proposed district, both maps shoot rays out from the northwest and southwest enclaves *to capture additional Hispanic population.*

Hastert, 777 F. Supp. at 648 n.24 (emphasis added). Portions of the western connector are also explainable only on racial grounds. For example, the portion of the Stickney township included in the Fourth Congressional District is 81.6% Hispanic and only 14.5% white while the portion of the township allocated to the Third Congressional District is 5.5% Hispanic and 93.2% white. Similarly, in Proviso Township, 57% of the township population

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[51]The former measure examines the percentage of Hispanics in any given census block (*e.g.*, 40% of the block's population is Hispanic) while the latter measure examines the racial composition of the entire census block. An Hispanic plurality census block exists when the largest population group among all the racial groups living within that block is Hispanic.

included in the Fourth Congressional District is Hispanic and 36.6% is white while the portion of the township included in the Third Congressional District is 4.9% Hispanic and 79.3% white.

The evidence also establishes that the boundaries of the Fourth Congressional District split a number of political subdivisions, including: eight (8) townships -- six (6) of which have population in the district; eighteen (18) municipalities -- sixteen (16) of which had population in the district; twenty (20) aldermanic wards; and two-hundred eighteen (218) precincts.[52] With the exception of precincts, other Illinois congressional districts split a comparable or greater number of subdivisions compared to the Fourth District: the Third, Sixth and Eleventh Districts split a similar number of townships (9, 8 and 7, respectively); the Second, Third, Sixth, Eighth, Eleventh and Thirteenth Districts all split more municipalities; and the First and Seventh Districts split a comparable number of aldermanic wards (19 and 15, respectively). This data, however, is of extremely limited usefulness because there is no meaningful standard against which it is to be measured. The data permits the uncertain conclusion that compared to other Illinois congressional districts, the map of the Fourth Congressional District did not excessively split political subdivisions. But this conclusion does not mean that respect for political subdivisions was not subordinated to racial considerations within the context of the Fourth Congressional District's boundaries. The data submitted does not inform the

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[52]These numbers were based upon the wards and precincts that existed at the time of the **Hastert** litigation. In 1992, the wards and precincts were realigned. Although Mr. Cleveland did not determine the number of wards split by the Fourth Congressional District after the realignment, he did disclose that the Fourth Congressional District split only sixty-one (61) of the realigned 1992 precincts. Mr. Cleveland's analysis properly focused, however, on the ward and precincts that existed at the time of the **Hastert** proceedings, since these were the only boundaries the map makers could have considered. In addition, it would be improper to consider the effect of the 1992 realignment, since it would be impossible to isolate what effect, if any, the Fourth Congressional District's boundaries adopted in 1991 had on the map makers who redrew the wards and precincts in 1992.

court one way or the other on this inquiry, and is therefore disregarded.[53]

The defendant-intervenors also argue that the district's configuration may be explained by socio-economic factors. To that end, Dr. David Garth Taylor testified at trial that the city's Caucasian, Hispanic and African-American populations have substantially different socio-economic status when home ownership, income, labor force participation, education and poverty levels are considered. Since the Fourth Congressional District is sixty-five percent (65%) Hispanic, it is not surprising that superimposing the socio-economic data onto maps of the city's congressional districts reveals that the electorate of the Fourth District have more socio-economic characteristics in common than the electorate of adjacent congressional districts. This observation notwithstanding, the socio-economic data does not explain the district's configuration. First, the socio-economic data was only available at the census group block level while the district was drawn at the smaller census block level. The defendant-intervenors have thus not shown that the socio-economic factors analyzed by Dr. Taylor were available or used at the time of the district's configuration.[54] Second, the **Hastert** court did not make any findings of fact concerning what role, if any, socio-economic factors played in the drawing of the district's boundaries. Hence, at best, the socio-economic model can only retrospectively explain the district's configuration but cannot demonstrate that the socio-economic data actually played a role in the configuration of the district's boundaries. Thus, while the socio-economic data establishes that the Hispanic community faces common issues, it fails to demonstrate that racial considerations did not predominate in the drawing of the district's

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[53]The **Hastert** court did not make any findings on this issue.

[54]According to Cleveland, King's expert, this data was not published by the Census Bureau until May 15, 1992, almost six months after the **Hastert** court issued its decision. Whether this information was available to the **Hastert** litigants is not known.

actual boundaries. *See also* **Vera v. Richards**, 861 F. Supp. 1304, 1338 (S.D. Tex. 1994), *cert. granted* ___ U.S. ___, 115 S. Ct. 2639 (1995) (same result); **Hays v. State of La.**, 839 F. Supp. 1188, 1203 (W.D. La. 1993) (same).[55]

Accordingly, this court concludes that racial considerations predominated in the configuration of the Fourth Congressional District, which was adopted but not drawn by the **Hastert** court.

V. Strict Scrutiny

Having concluded that racial considerations predominated, this court must now subject the Fourth Congressional District to strict scrutiny; the district will only pass constitutional muster if it is narrowly tailored to serve a compelling state interest. Submitting a redistricting plan to strict scrutiny does not automatically toll the bells. The Supreme Court in **Adarand Constructors, Inc. v. Pena** most recently sought "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" ___ U.S. ___, 115 S. Ct. 2097, 2117 (1995) (citation omitted).

The defendant-intervenors contend that the **Hastert** court found and articulated a compelling government interest justifying the racially based configuration of the Fourth Congressional District; namely, remedying a potential violation of Section 2 of the Voting Rights Act. King raises two arguments in response: first, the **Hastert** court erred in finding that Section 2 of the Voting Rights Act required the creation of an Hispanic majority district; and second, remedying a Section 2 violation is not a compelling government interest. Since the Supreme Court has not yet decided the latter proposition, prudence dictates that this court

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[55] *Vacated* **Louisiana v. Hays**, ___ U.S. ___, 114 S. Ct. 2731 (1994), *on remand*, **Hays v. State of La.**, 862 F. Supp. 119 (W.D. La. 1994), *vacated* **United States v. Hays**, ___ U.S. ___, 115 S. Ct. 2431 (1995), *on remand* **Hays v. State of La.**, No. 92-1241, slip op. (W.D. La. Jan 5, 1996).

should address and resolve King's first argument before considering what is really the threshold argument for this strict scrutiny analysis.

A. Whether the **Hastert** Court's Section 2 Finding Was Clear Error

The passage of time since the **Hastert** decision was announced in 1991 has provided this court with a unique vantage point from which to assess the validity of King's allegations of error. More specifically, two congressional elections have been held since 1991; in both elections, an Hispanic candidate was elected to Congress from the Fourth Congressional District. These electoral results minimize in many respects the force of King's arguments that the **Hastert** court erred in finding that the three **Gingles** prerequisites were satisfied. The Supreme Court in **Growe v. Emison** recently reiterated the reasons for the **Gingles** threshold requirements:

> The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single member district, *see Gingles*, 478 U.S. at 50 n.17, 106 S. Ct. at 2765 n.17. And the 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population, *see Gingles, supra*, at 51, 106 S. Ct. at 2766.

507 U.S. 25, 113 S. Ct. 1075, 1084 (1992). The **Hastert** court's conclusions about the potential of the Hispanic electorate to elect a representative of its own choice have proved prescient in light of the 1992 and 1994 congressional election results. These same electoral successes, however, are fundamentally at odds with the purpose of the majority bloc voting prerequisite. While non-Hispanic racial bloc voting patterns did not thwart the election of the Hispanic's candidate of choice in the 1992 and 1994

congressional elections, discounting the effect of racially polarized voting based upon these two election results would be premature. The **Hastert** court found racial bloc voting at the federal, state and local levels; the framework for assessing the third **Gingles** prerequisite is thus broader than congressional elections. As the Supreme Court has recognized, "[t]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." **Johnson v. DeGrandy**, ___ U.S. ___, 114 S. Ct. 2647, 2654 (1994) (*quoting* **Voinovich v. Quilter**, 507 U.S. 146, 113 S. Ct. 1149, 1157 (1993)). The **Gingles** prerequisites must nevertheless be clearly established. To that end, the Supreme Court has admonished that racial bloc voting and minority group political cohesion can never be assumed but must be specifically proven in each case.[56] **Growe**, 507 U.S. at ___, 113 S. Ct. at 1085.

King first argues that the **Hastert** court erred in finding that the Hispanic community was sufficiently numerous to constitute a majority in a properly drawn district. The genesis of this alleged error was the **Hastert** court's failure to determine the proper *eligible* minority voting population, which King defines as Hispanic citizens of voting age. *See* **Campos v. City of Houston**, 894 F. Supp. 1062, 1065 (S.D. Tx. 1995) (data on voting age Hispanic citizens is the proper measure of an Hispanic population's ability to create a majority voting district); **Romero v. City of Pomona**, 883 F.2d 1418, 1425 (9th Cir. 1989) (affirming district court's conclusion that none of the proposed districts had a majority Hispanic population once citizenship and voting age were considered); *see also* **Vera v. Richards**, 861 F. Supp. 1304, 1340 n.49 (S.D. Tx. 1994) (while noting that Section 2 vote dilution claims "are ordinarily premised on measures of

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[56]The district court must make specific findings to support each **Gingles** prerequisite. *See* **Statewide Reapportionment Advisory Comm. v. Theodore**, ___ U.S. ___, 113 S.Ct. 2954 (1993) (where the Court adopted the position advanced by the Solicitor General that the three judge panel had given inadequate consideration to and made inadequate findings concerning §2 of the Voting Rights Act and remanded the case for further development of the record in accordance with the points raised in the Solicitor General's *amicus* brief).

citizen voting age population," the court assumed for equal protection purposes that "Hispanics are Hispanics, whether citizens or not"), *cert. granted* ___ U.S. ___, 115 S. Ct. 2639 (1995).

Other courts have agreed in principle that only eligible minority voters should be considered in determining numerosity; however, these courts have defined eligible minority population to mean minority voting age population. *See, e.g.*, **McNeil v. Springfield Park Dist.**, 851 F.2d 937, 944-45 (7th Cir. 1988), *cert. denied* 490 U.S. 1031, 109 S.Ct. 1769 (1989); **Ketchum v. Byrne**, 740 F.2d 1398, 1412 (7th Cir. 1984); **League of United Latin Am. Citizens v. North East Indep. School Dist.**, 903 F. Supp. 1071, 1084 (W.D. Tx. 1995) (noting that with the exception of *Campos*, the district courts in the Fifth Circuit consider voting age population in evaluating the first *Gingles* prerequisite). The Seventh Circuit in **McNeil** explained the reason for the voting age population limitation as follows:

> Read literally, the *Gingles* population requirement could be construed to require that the minority group constitute a majority only of the total population in a proposed single-member district. Substantial evidence and common sense, however, dispute this construction. . . . The threshold requirement roughly measures minority voters' potential to elect candidates of their choice. Because only minorities of voting age can affect this potential, it is logical to assume that the Court intended the majority requirement to mean a voting age majority. Viewed another way, those ineligible to vote have not experienced a dilution of their vote. They are not parties to a Section 2 claim.

851 F.2d at 945. The Seventh Circuit has not yet addressed whether citizenship should also be considered a component of

voter eligibility for the **Gingles** population requirement.[57] The Supreme Court has also not decided this issue. *See* **DeGrandy**, ___ U.S. at ___, 114 S. Ct. at 2655-56; **Growe**, 507 U.S. at ___ n.4, 113 S. Ct. at 1083 n.4.

This court too declines to resolve this question since King has not established via competent evidence that the Hispanic citizen voting age population falls below fifty percent.[58] Hence, regardless of which measure this court uses -- total population, voting age population, or citizen voting age population -- the **Hastert** court properly found that the City of Chicago/Cook

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[57]The Seventh Circuit in **Ketchum** flirted with the idea of considering citizenship as a measurement of population, *see* 740 F.2d at 1415 (advising district court that it could consider whether the Hispanic wards on the Southwest Side should have their majorities calculated on the basis of "only those individuals who are eligible, as citizens, to vote"), but it did so because "there should be an appropriate corrective for non-citizenship." **Id.** at 1415 n.19.

[58]The 1990 census data reported that 194,438 of the 345,307 Hispanic residents in the City of Chicago were United States citizens, or 56.30%. This data, however, was not available at the time of the **Hastert** decision.

The census report notwithstanding, King's witness Cleveland, testified at trial that only forty-five percent (45%) of the Fourth Congressional District's Hispanic population were citizens. There are simply too many uncertainties surrounding the validity of the data used by King to warrant such a conclusion. First, the 1990 census data was reported at the census block group level rather than the census block level. The Fourth District's boundaries were drawn, however, at the smaller census block level and split at least 150 census group blocks. Second, the census reported citizenship data was based on sample data rather than on 100% enumeration, the basis upon which total population and voting age population are reported. Third, Cleveland admitted that the census data provided only a snapshot view of citizenship levels in 1990, and thus did not take into account changes in citizenship levels since 1990 due to naturalization and the amnesty program of the Immigration and Naturalization Control Act of 1986. Indeed, Dr. Taylor testified on behalf of the defendant-intervenors that a large number of persons granted amnesty under that Act resided in zip code areas located within the northern and southern areas of the Fourth District. Cleveland's calculations did not compensate for amnesty programs, and likewise did not account for either an overreporting or underreporting of citizenship data. Based on these flaws, this court declines to find that the Hispanic citizenship rate in the Fourth Congressional District was approximately forty-five percent (45%) either in 1990 or today.

County community was sufficiently numerous to constitute a majority in a properly drawn district. The congressional election results of 1992 and 1994 serve to confirm this conclusion.

King next contends that the **Hastert** court erred in finding that the Hispanic community was politically cohesive. The premise of his argument is that the Puerto Rican and Mexican-American communities, which together account for the overwhelming majority of Chicago's Hispanic community, have different cultural, social, political and economic concerns that serve to separate rather than unify the Latino community. King further contends that these differences have manifested themselves in ethnically polarized bloc voting: Mexican-Americans predominately vote for Mexican-American candidates while Puerto-Ricans predominately vote for Puerto Rican candidates. The lay opinion elicited by King at trial to demonstrate and substantiate the claimed lack of cohesion was mainly anecdotal, often incredible, and wholly insufficient to support the inferences and conclusions King seeks to draw. King has thus failed to establish that the **Hastert** court's finding of political cohesiveness was clearly erroneous. He has likewise failed to establish that the circumstances have changed in any quantifiably significant measure since 1991.[59]

King also argues that changed circumstances since 1991 have lessened white racial bloc voting, such that "it is now a rare case that an Hispanic candidate of choice is defeated as a result of racial bloc voting." Neither proposition advanced by King is

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[59]To the contrary, the factual record is replete with testimony establishing the political and social cohesiveness of the Hispanic community. State Senators Jesus Garcia and Miquel Del Valle both testified about the common political concerns of the Mexican-Americans and Puerto-Ricans and their joint efforts to represent the entire Latino community in the Illinois General Assembly. Congressman Luis Guttierrez likewise identified common political, economic and social concerns that affect both Mexican-Americans and Puerto-Ricans. Dr. Felix Padilla, a respected sociologist and ethnographer, also testified at length about the historical as well as present-day solidarity and cohesiveness of the Chicago Latino community.

supported by recent city-wide election results or meaningful statistical analysis. Since 1988, only three Hispanic candidates have been elected in citywide elections. Two Hispanic judges were elected in 1988 and 1990; however, both candidates won with less than a majority of the vote due to a splintering of votes among multiple white candidates. In addition, Miriam Santos, an Hispanic, was elected as city treasurer in 1991; however, Ms. Santos had been slated for this position by the Chicago Democratic Party and she ran on a slate that included incumbent mayor Richard Daley. Ms. Santos subsequently ran as an incumbent in 1995 and was reelected. With the exception of Ms. Santos, the Democratic Party has not slated an Hispanic candidate for alderman, state senate, state representative, or congress in any district with a white majority voting age population.

King's proposition is also statistically invalid. The results of Dr. Allan J. Lichtman's ecological regression analysis and extreme case performance of forty-one elections held between 1983 and 1995 establish a definite and continuing pattern of white racial-bloc voting against Hispanic candidates.[60] Dr. Lichtman's analysis reveals that "since 1987, Hispanics have been elected in every election district for every type of office with a voting age majority of Hispanics, but not in any district lacking such a majority." Based upon these results, Dr. Lichtman concludes that "Hispanics in the City of Chicago would have a reasonable opportunity to elect a candidate of their choice to Congress only in a district with a voting-age majority of Hispanics."

While Ms. Santos's electoral success raises hopes for a color-blind slating and election processes in the future, the

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[60]Dr. Lichtman studied precinct-by-precinct election returns for 41 partisan and non-partisan (*i.e.*, City Council) elections involving Hispanic and non-Hispanic candidates in the City of Chicago from 1983 to the present in which the losing candidate, whether Hispanic or not, received at least fifteen percent of the vote.

In addition, Dr. Lichtman supplemented his ecological regression and extreme case analysis by examining the squared correlation coefficients. This value is used to assess the strength of association between two variables.

problems of racial bloc voting and exclusion of Hispanics from the powerfully important slating process remain. The **Hastert** court thus properly found that the third **Gingles** factor was satisfied in 1991, and King has not established any present day change in circumstances that would warrant a contrary finding.

King finally argues that the Fourth Congressional District was not sufficiently compact to create a separate Hispanic District. To demonstrate this point, King argues that the 743-sided district is neither visually nor mathematically compact. Once again, King has confused the **Gingles** threshold requirement of geographical compactness with the principle of compactness used to assess whether racial gerrymandering has occurred. *See supra* footnote 48. The question raised by **Gingles** is whether the minority population (and not the district drawn to accommodate that population) is geographically compact and sufficiently numerous to constitute a majority in a single member district. This measure of geographical compactness thus concerns whether a Section 2 violation has occurred; the second measure of compactness (*i.e.*, as a traditional race-neutral districting principle) concerns whether the district drawn to remedy the Section 2 violation satisfies the requirements of the Equal Protection Clause. To conflate the two into a single measurement confuses the liability with the damages analysis, and represents an unwarranted extension of **Shaw**. *But see* **Reed v. Town of Babylon**, ___ F. Supp. ___, 1996 WL 28966, at *26 (E.D.N.Y. 1996) (where the court applied the principles established in **Shaw** to the first **Gingles** prerequisite, and concluded that "the plaintiffs must, in order to meet their burden of proof under the first **Gingles** precondition, either "proffer a districting plan which does not subordinate racial considerations to traditional districting principles, including compactness . . . , or justify the need for such subordination") (citations omitted). This court accordingly concludes that the **Hastert** court's finding of geographic compactness was appropriate.

Since King has limited his challenges to the Hastert court's findings concerning the existence of the three Gingles

prerequisites, this court will not undertake to review or supplement the prior court's findings with respect to the totality of circumstances test.[61] The **Hastert** court properly held an Hispanic majority district was warranted under Section 2 of the Voting Rights Act.

B. Whether Remedying a Section 2 Violation is a Compelling State Interest

Section 2 of the Voting Rights Act prohibits "any practice or procedure that, 'interacting with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." **Voinovich v. Quilter**, 507 U.S. 146, 113 S. Ct. 1149, 1155 (1993) (*quoting* **Gingles**, 478 U.S. at 47, 106 S. Ct. at 2764); *accord* **DeGrandy**, ___ U.S. at ___, 114 S. Ct. at 2655. Because the purpose of Section 2 is "to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race [or] color . . . ", **Voinovich**, 507 U.S. at ___, 113 S. Ct. at 1154-55 (*quoting* U.S. Const., Amdt. 15), state actors have frequently argued that a racially based redistricting remedy under Section 2 serves a compelling government interest. *See, e.g.*, **Quilter v. Voinovich**, ___ F. Supp. ___, 1995 WL 783342 (N.D. Oh.), *appeal dismissed* ___ U.S. ___, 116 S.Ct. 42 (1995); **Shaw**, 861 F. Supp. at 437; **Hays v. State of La.**, 839 F. Supp. 1188, 1217 (W.D. La. 1993) (Walter, J., concurring). The Supreme Court, however, has not yet decided whether "compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination . . . ." **Miller**, ___ U.S. at ___, 115 S. Ct. at 2491.

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[61]The three **Gingles** factors are necessary prerequisites but are not collectively sufficient to establish a §2 violation. **DeGrandy**, ___ U.S. at ___, 114 S. Ct. at 2657, 2658 & n. 10 (*citing* **Baird v. Consolidated City of Indianapolis**, 976 F.2d 357 (1992), *cert. denied* ___ U.S. ___, 113 S.Ct. 2334 (1993)).

The Supreme Court has nonetheless recognized a distinction "between what the [Voting Rights Act] permits, and what it requires." **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2830. Based upon this distinction, the Supreme Court has concluded that "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." **Miller**, ___ U.S. at ___, 115 S. Ct. at 2491 (*citing* **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2830-31). This rule is based upon the fundamental precept that "the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." **Voinovich**, 507 U.S. at ___, 113 S. Ct. at 1156 (*citing* **Growe**, 507 U.S. at __, 113 S. Ct. at 1084).

Where a violation of the Voting Rights Act has been established, a race based remedy may be appropriate. In **Shaw**, the Court recognized that a significant state interest exists in eradicating the effects of past racial discrimination, provided the State has a "strong basis in evidence for concluding that remedial action [is] necessary." **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2831-32 (citations omitted); *see also* **Miller**, ___ U.S. at ___, 115 S. Ct. at 2475 ("When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied."). This compelling state interest extends to remedying past or present violations of federal statutes intended to eliminate discrimination in specific aspects of life. *See* **Quilter**, ___ F. Supp. at ___, 1995 WL 783342, at *9 (*citing* **Croson**, 488 U.S. at 500, 109 S. Ct. at 725; **Wygant**, 476 U.S. at 274-75, 106 S. Ct. at 1846-47); *accord* **Shaw**, 861 F. Supp. at 437.

In this case, the **Hastert** court had a strong basis both for finding a Section 2 violation and for adopting a redistricting plan that remedied that violation. In this regard, the **Hastert** court cited with approval prior judicial determinations that found a definite pattern and practice of electoral discrimination against the

Hispanic community in the City of Chicago and the State of Illinois.[62] The **Hastert** court further found that this historical discrimination against the Hispanic community was on-going, most visibly in the racial bloc voting that effectively limited the Hispanic community to a disproportionately small number of elected Hispanic officials at the city and state-levels and more subtly in the social and economic discrimination that adversely affected effective political participation and representation. Under these circumstances, the creation of an Hispanic majority district advanced the state's compelling interest of remedying past electoral discrimination against Hispanics. However, the redistricting plan adopted by the **Hastert** court has served more than a remedial role: hindsight reveals that it has protected the Hispanic community since 1991 from the invidious effects of racial bloc voting that, regrettably, retains its chokehold on the Chicago electorate. Accordingly, this court concludes that the remedy adopted by the **Hastert** court to redress an established Section 2 violation served, and continues to serve, compelling state interests.

In reaching this conclusion, the court drew an important distinction between using a race-based remedy to redress demonstrable injuries from specific, discriminatory electoral practices as opposed to redressing the effects of more generalized discrimination. In **Miller**, for example, the Supreme Court concluded that Georgia's Eleventh Congressional District was not required by the Voting Rights Act but instead was created in response to the Department of Justice's tactical withholding of

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[62]As previously observed in footnote 21 *supra*, aligning the **Hastert** parties along partisan political lines resembled a partisan division highly reminiscent of the state legislature. The parties' bipartisan agreement that an Hispanic majority district needed to be created under §2 was thus an important acknowledgement, tantamount to an "official" concession, that the then existing electoral practices and procedures, combined with historical and social conditions, caused a dilution of Hispanic voting power in violation of §2. The parties' bipartisan agreement as to the nature and configuration of the Hispanic majority district was an equally important acknowledgement/tacit concession that remedying the discriminatory effects of that vote dilution served a compelling interest.

Section 5 preclearance approval. The DOJ's "black-maximization" policy that forced the Georgia legislature into creating the majority-minority Eleventh Congressional District was not based on any demonstrated minority vote dilution under Section 2 or retrogression under section 5; as such, the Eleventh Congressional District was not created in response to a particularized, proven injury. Instead, the DOJ's "black-maximization" policy may only be viewed as an effort to redress the generalized effects of prior discriminatory practices. In contrast, the **Hastert** court adopted the Fourth Congressional District to remedy a proven Section 2 violation. The injuries resulting from the dilution of the Hispanic voting power were clear and present. The nature and extent of the Voting Rights Act violation are thus important factors in the calculus of considerations analyzed to determine whether a race-based remedy serves a compelling state interest.

C. The Court-Ordered Redistricting Plan is Narrowly Tailored

The final prong of the strict scrutiny analysis requires this court to determine whether the Fourth Congressional District as adopted by the **Hastert** court is narrowly tailored. The focus of this inquiry is whether the means chosen to accomplish the compelling state interest are specifically and narrowly framed to accomplish that purpose. *See* **Wygant**, 476 U.S. at 280, 106 S. Ct. at 1850. Alternatively stated, the question is whether in configuring the Fourth Congressional District, race was taken into account to a greater degree than necessary to further a compelling state interest.[63] **Shaw**, 861 F. Supp. at 408.

The Supreme Court has not established any standards for evaluating whether a racially based redistricting plan is narrowly

[63]"Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." **Wygant**, 476 U.S. at 280, 106 S. Ct. at 1850 (*quoting* **Fullilove v. Klutznik**, 448 U.S. 448, 537, 100 S. Ct. 2758, 2805 (1980) (Stevens, J., dissenting)).

tailored, except to state that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." **Shaw**, ___ U.S. at ___, 113 S. Ct. at 2831. As a result, federal district courts have employed differing standards to determine whether a racially based redistricting plan is narrowly tailored. *Compare* **Shaw**, 861 F. Supp. at 444-56; **Quilter**, ___ F. Supp. at ___, 1995 WL 783342, at *10-12, *with* **Vera**, 861 F. Supp. at 1343 & n.44.

This court, however, does not need to take sides in this dispute. Its task is to determine whether a *court-ordered* reapportionment plan is narrowly tailored. As such, it must defer to **Hastert** court's discretion in selecting an appropriate remedy. *See* **United States v. Paradise**, 480 U.S. 149, 183-85, 107 S. Ct. 1053, 1073-74 (1987). As the Supreme Court explained,

> In determining whether this order was 'narrowly tailored,' we must acknowledge the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment. A district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future . . . .

Id. at 183, 107 S. Ct. at 1073 (citation omitted). The Court further acknowledged that it has not required in all situations that remedial plans "be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is a 'balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" **Id.** (citations omitted).

There is no evidence that the **Hastert** court abused its discretion. Prior to adopting a remedial plan, the court subjected the proposed plans to an exacting constitutional review and

determined which plan would provide a better, more complete remedy for the Section 2 violation. In addition, the remedial plan it adopted was properly proportioned to the nature of the violation. That is, the court adopted a single majority-minority district which was limited in size to the minimum number of Hispanic residents generally believed necessary to counteract the effects of racial bloc voting and ensure that the Hispanic electorate had a reasonable opportunity to elect a candidate of its choice. It further determined that the district's extraordinary configuration was required to preserve shared communities of interest and protect the three African-American super-majority districts against impermissible retrogression. Under these circumstances, this court defers to the **Hastert** court's balancing of these concerns and concludes that it adopted a narrowly tailored plan. Where the drawing even of irregular lines is required to remedy established violations of the Voting Rights Act, the court need not flinch from its obligation to do so with a bold and deliberate pen. Accordingly, the Fourth Congressional District passes constitutional muster.[64]

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[64]King's Motion for a Preliminary Injunction is therefore denied.

WHEREFORE, for the foregoing reasons, this court concludes that the Fourth Congressional District is constitutional.

ENTER:

Michael S. Kanne /s/
Michael S. Kanne
U.S. Circuit Judge

Charles R. Norgle, Sr. /s/
Charles R. Norgle, Sr.
U.S. District Judge

David H. Coar /s/
David H. Coar
U.S. District Judge

Dated: March 7, 1996

VOTING RIGHTS ACT OF 1965, SECTIONS 2A AND 2B

TITLE 1 - VOTING RIGHTS

Sec. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

FEDERAL RULES OF EVIDENCE - RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

10 ILLINOIS COMPILED STATUTES 5/11-2
ARTICLE 11. ESTABLISHMENT OF ELECTION PRECINCTS

10 ILCS 5/11-2, County board to fix precincts and places of election--List of precincts--Elections for judges

Sec. 11-2. The County Board in each county, except in counties having a population of 3,000,000 inhabitants or over, shall, at its regular meeting in June, divide its election precincts which contain more than 800 voters, into election districts so that each district shall contain, as near as may be practicable, 500 voters, and not more in any case than 800. Whenever the County Board ascertains that any election precinct contains more than 600 registered voters, it may divide such precinct, at its regular meeting in June, into election precincts so that each precinct shall contain, as nearly as may be practicable, 500 voters. Insofar as is practicable, each precinct shall be situated within a single congressional, legislative and representative district and in not more than one County Board district and one municipal ward. In order to situate each precinct within a single district or ward, the County Board shall change the boundaries of election precincts after each decennial census as soon as is practicable following the completion of congressional and legislative redistricting. In determining whether a division of precincts should be made, the county board may anticipate increased voter registration in any precinct in which there is in progress new construction of dwelling units which will be occupied by voters more than 30 days before the next election. Each district shall be composed of contiguous territory in as compact form as can be for the convenience of the electors voting therein. The several county boards in establishing districts shall describe them by metes and bounds and number them. And so often thereafter as it shall appear by the number of votes cast at the general election held in November of any year, that any election district or undivided election precinct contains more than 800 voters, the County Board of the county in which the district or precinct may be, shall at its regular meeting in June, or an adjourned meeting in July next, after such November election, redivide or readjust such election district or election precinct, so

that no district or election precinct shall contain more than the number of votes above specified. If for any reason the County Board fails in any year to redivide or readjust the election districts or election precinct, then the districts or precincts as then existing shall continue until the next regular June meeting of the County Board; at which regular June meeting or an adjourned meeting in July the County Board shall redivide or readjust the election districts or election precincts in manner as herein required. When at any meeting of the County Board any redivision, readjustment or change in name or number of election districts or election precincts is made by the County Board, the County Clerk shall immediately notify the State Board of Elections of such redivision, readjustment or change. The County Board in every case shall fix and establish the places for holding elections in its respective county and all elections shall be held at the places so fixed. The polling places shall in all cases be upon the ground floor in the front room, the entrance to which is in a highway or public street which is at least 40 feet wide, and is as near the center of the voting population of the precinct as is practicable, and for the convenience of the greatest number of electors to vote thereat; provided, however, where the County Board is unable to secure a suitable polling place within the boundaries of a precinct, it may select a polling place at the most conveniently located suitable place outside the precinct; but in no case shall an election be held in any room used or occupied as a saloon, dramshop, bowling alley or as a place of resort for idlers and disreputable persons, billiard hall or in any room connected therewith by doors or hallways. No person shall be permitted to vote at any election except at the polling place for the precinct in which he resides, except as otherwise provided in this Section or Article 19 of this Act. In counties having a population of 3,000,000 inhabitants or over the County Board shall divide its election precincts and shall fix and establish places for holding elections as hereinbefore provided during the month of January instead of at its regular meeting in June or at an adjourned meeting in July.

However, in the event that additional divisions of election precincts are indicated after a division made by the County Board

in the month of January, such additional divisions may be made by the County Board in counties having a population of 3,000,000 inhabitants or over, at the regular meeting in June or at adjourned meeting in July. The county board of such county may divide or readjust precincts at any meeting of the county board when the voter registration in a precinct has increased beyond 800 and an election is scheduled before the next regular January or June meeting of the county board.

When in any city, village or incorporated town territory has been annexed thereto or disconnected therefrom, which annexation or disconnection becomes effective after election precincts or election districts have been established as above provided in this Section, the clerk of the municipality shall inform the county clerk thereof as provided in Section 4-21, 5-28.1, or 6-31.1, whichever is applicable. In the event that a regular meeting of the County Board is to be held after such notification and before any election, the County Board shall, at its next regular meeting establish new election precinct lines in affected territory. In the event that no regular meeting of the County Board is to be held before such election the county clerk shall, within 5 days after being so informed, call a special meeting of the county board on a day fixed by him not more than 20 days thereafter for the purpose of establishing election precincts or election districts in the affected territory for the ensuing elections.

At any consolidated primary or consolidated election at which municipal officers are to be elected, and at any emergency referendum at which a public question relating to a municipality is to be voted on, notwithstanding any other provision of this Code, the election authority shall establish a polling place within such municipality, upon the request of the municipal council or board of trustees at least 60 days before the election and provided that the municipality provides a suitable polling place. To accomplish this purpose, the election authority may establish an election precinct constituting a single municipality of under 500 population for all elections, notwithstanding the minimum precinct size otherwise specified herein.

Notwithstanding the above, when there are no more than 50 registered voters in a precinct who are entitled to vote in a local government or school district election, the election authority having jurisdiction over the precinct is authorized to reassign such voters to one or more polling places in adjacent precincts, within or without the election authority's jurisdiction, for that election. For the purposes of such local government or school district election only, the votes of the reassigned voters shall be tallied and canvassed as votes from the precinct of the polling place to which such voters have been reassigned. The election authority having jurisdiction over the precinct shall approve all administrative and polling place procedures. Such procedures shall take into account voter convenience, and ensure that the integrity of the election process is maintained and that the secrecy of the ballot is not violated.

Except in the event of a fire, flood or total loss of heat in a place fixed or established by any county board or election authority pursuant to this Section as a polling place for an election, no election authority shall change the location of a polling place so established for any precinct after notice of the place of holding the election for that precinct has been given as required under Article 12 unless the election authority notifies all registered voters in the precinct of the change in location by first class mail in sufficient time for such notice to be received by the registered voters in the precinct at least one day prior to the date of the election.

The provisions of this Section apply to all precincts, including those where voting machines or electronic voting systems are used.

10 ILCS 5/11-3, Establishment, revision and rearrangement of precincts--Duty of board

Sec. 11-3. It shall be the duty of the Board of Commissioners established by Article 6 of this Act, within 2 months after its first organization, to divide the city, village or

incorporated town which may adopt or is operating under Article 6, into election precincts, each of which shall be situated within a single congressional, legislative and representative district insofar as is practicable and in not more than one County Board district and one municipal ward; in order to situate each precinct within a single district or ward, the Board of Election Commissioners shall change the boundaries of election precincts after each decennial census as soon as is practicable following the completion of congressional and legislative redistricting and such precincts shall contain as nearly as practicable 600 qualified voters, and in making such division and establishing such precincts such board shall take as a basis the poll books, or the number of votes cast at the previous presidential election. Within 90 days after each presidential election, such board in a city with fewer than 500,000 inhabitants, village or incorporated town shall revise and rearrange such precincts on the basis of the votes cast at such election, making such precincts to contain, as near as practicable, 600 actual voters; but at any time in all instances where the vote cast at any precinct, at any election, equals 800, there must be a rearrangement so as to reduce the vote to the standard of 600 as near as may be. However, any apartment building in which more than 800 registered voters reside may be made a single precinct even though the vote in such precinct exceeds 800. Within 90 days after each presidential election, a board in a city with more than 500,000 inhabitants shall revise and rearrange such precincts on the basis of the votes cast at such election, making such precincts to contain, as near as practicable, 400 actual voters; but at any time in all instances where the vote cast at any precinct, at any election, equals 600, there must be a rearrangement so as to reduce the vote to the standard of 400 as near as may be. However, any apartment building in which more than 600 registered voters reside may be made a single precinct even though the vote in such precinct exceeds 600.

Immediately after the annexation of territory to the city, village or incorporated town becomes effective the Board of Election Commissioners shall revise and rearrange election precincts therein to include such annexed territory.

Provided, however, that at any election where but one candidate is nominated and is to be voted upon at any election held in any political subdivision of a city, village or incorporated town, the Board of Election Commissioners shall have the power in such political subdivision to determine the number of voting precincts to be established in such political subdivision at such election, without reference to the number of qualified voters therein. The precincts in each ward, village or incorporated town shall be numbered from one upwards, consecutively, with no omission.

The provisions of this Section apply to all precincts, including those where voting machines or electronic voting systems are used.

SECRET BALLOT LAW - PART 9.1. VOTER'S PRIVILEGE

5/8-910. Voter's privilege

§ 8-910. No person shall be compelled to disclose, in any proceeding conducted by a court, commission, administrative agency, or other tribunal in the State, the name of any candidate for whose nomination, election, or retention in office the person voted, or whether the person voted for or against any question of public policy, as defined in Section 1-3 of The Election Code[1] , at any election held within this State.

[1] 10 ILCS 5/1-3.

EXCERPT TEXT OF DIRECT EXAMINATION TESTIMONY OF PLAINTIFF'S WITNESS, CHRISTOPHER J. CLEVELAND

[155] JUDGE KANNE: Plaintiff's 41 is admitted. Q: And what did this particular section of the 4th Congressional District show you? A: Well, this particular section shows the raggedness of the boundary in some detail. I don't know how easy it is to actually see the boundary from that distance, but if you follow along, you can see that it picks block by block along the corridor those Hispanic blocks that have the highest density. There are other Hispanics on the other side of the border, but it appears that these were drawn in such a way as to maximize the Hispanic content. For example, as you travel downward here, you can see that the district cuts east again to pick up a heavily [156] Hispanic block, which has a substantial population.

EXCERPT TEXT OF DIRECT EXAMINATION TESTIMONY OF PLAINTIFF'S WITNESS, CHRISTOPHER J. CLEVELAND

[156] As you travel west, again you are grabbing the corridor of Hispanic population. There are occasional white blocks within this connector area here and here, for example. These are, for the most part, zero population blocks that correspond to parks or empty industrial land. So they have no effect upon the racial content of the district. It's particularly useful to note the detail with which they do it. This for example, is just wandering out into the neighborhood, block by block, grabbing one, grabbing one there. Here it's gone up to grab individual blocks with heavy Hispanic content.

HISPANIC POPULATION IN THE TOWNSHIPS OF THE WESTERN CONNECTOR

(EXCERPT FROM DEFENDANT EXHIBIT D-I 2)

	3rd Congressional District				4th Congressional District				5th Congressional District			
	Total Pop.	White Pop.	Hisp. Pop.	% Hisp	Total Pop.	White Pop.	Hisp. Pop.	% Hisp	Total Pop.	White Pop.	Hisp. Pop.	% Hisp
Cicero	39,480	29,675	8,899	22.5	27,956	11,484	16,032	57.3				
Leyden					1,608	1,512	89	5.5	73,409	62,711	8,629	11.8
Oak Park	7,698	5,967	309	4.0	901	626	43	4.8				
Proviso	7,962	6,317	387	4.9	13,339	4,846	7,599	57.0	16,519	13,303	2,602	15.8
River Forest					0	0	0	0.0				
Riverside	13,379	12,876	369	2.8	0	0	0	0.0				
Stickney	37,063	34,535	2,020	5.5	234	34	191	81.6				

DIRECT EXAMINATION TESTIMONY OF
DR. D. GARTH TAYLOR

HASTERT V. STATE BD. OF ELECTIONS, 91 C 4028

[110] The upper area . . . which includes the upper area of District 4 on the map, the lower area of District 4 on the map, and then the connecting corridor that goes west into suburban Cook County, when we compare that, when we overlay that region on the pattern showing Hispanic increase and decrease, by and large, the district includes areas that are not only high Hispanic concentrations, as we showed on the previous map, but areas where Hispanic concentration has been increasing [111] in the last decade and does not include areas where Hispanic population has been declining in the last decade. Q: Now Mr. Taylor, did you examine the western connector of the proposed Hispanic district with respect to Hispanic population change? A: Yes, I did. Q: And what did you find when you did that examination? A: The western connector contains several areas that as we look at them on the map and on the overlay we can see that it includes several areas where the Hispanic population is, in fact, increasing in those areas, has been increasing for the last decade in those areas. Q: Based upon that examination, what is your prediction for the western connector? A: This is a strong basis to predict that the western connector will, in fact, become more Hispanic, well, that the areas in green will generally become more Hispanic over the next decade, but, specifically, these areas in the western connector as well.

EXCERPT AFFIDAVIT TESTIMONY OF
ORESTES AGUILLON, PLAINTIFF'S EXHIBIT 9

[Page 3]

6. I used GIS plus software to analyze Cook County's Hispanic population to determine the possibility of creating a majority Hispanic congressional district. I have determined that a majority Hispanic district can be created with basically three different configurations. These configurations include joining Cook County's north/south Hispanic populations around the west, ("western connector"), through the middle ("middle connector") and using a connector around the east ("eastern connector"). These different connectors can render several configurations for a Hispanic congressional district all with a Hispanic population ranging from 63.0% to 65% of the total population.

7. Joining Cook County's north/south Hispanic populations by the use of a connector is necessary in order to create a majority Hispanic congressional district. In all the plans I developed, in addition to creating a majority Hispanic district, I also made sure that the existing 7th congressional district as well as the 1st and 2nd districts, all had total African-American populations of 65% and above.

8. The configuration for the specific congressional Hispanic districts which I created are as follows:

Eastern Connector Map (Exhibit A)

The first Hispanic congressional district that I developed, (Exhibit A), contained a total Hispanic population of 63%. Although the percentage of Hispanic population could be increased to near 65%, at the request of the Committee, I began to explore other alternative configurations.

Middle Connector Map I (Exhibit B)

The next alternative which I developed involved the use of a middle connector to connect north/south Cook County's Hispanic populations. (Exhibit B). The connector is bounded on the west side by Western Avenue and Damen Avenue on the east side. This configuration has a total Hispanic population of 64.2%. Although the percentage of the Hispanic population for the middle connector district could be increased to near 65%, at the request of the Latino Committee I began to explore another alternative configuration.

Middle Connector Map II (Exhibit C)

In conjunction with the representatives from the Chicago Urban League, and the African-American plaintiffs named in the Nieves complaint I developed another alternative, the middle connector Hispanic congressional district II. This map contains a Hispanic total population of 64%. The connector boundaries for this configuration are the Chicago River on the east side, and Halsted Street on the west side. The middle eastern connector map was the result of lengthy negotiations among the African-American plaintiffs named in Nieves complaint, the Hispanic plaintiffs, and the Latino Committee.

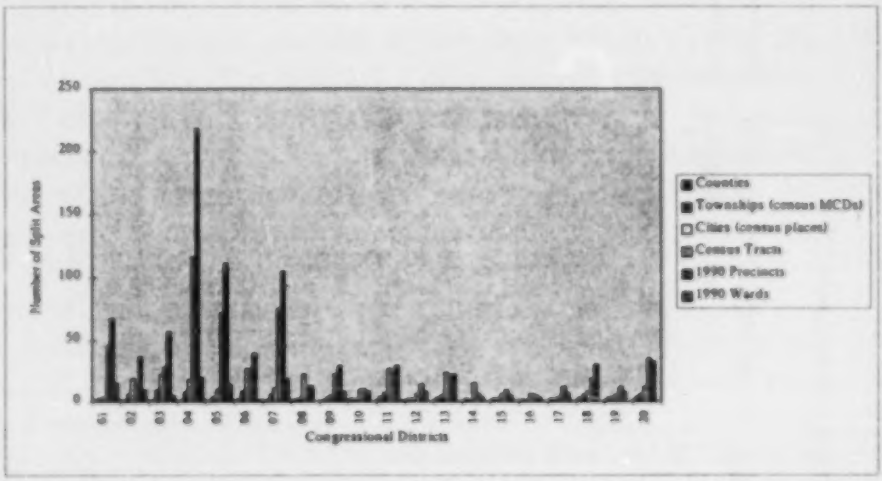
Western Connector Map (The Urban League Map) (Exhibit D)

Subsequently, the Chicago Urban League developed an Hispanic district which joined north/south Cook County's Hispanic population through a connector on the west side. I analyzed this map, and made adjustments in order to increase the percentage of the Hispanic population in the Hispanic district. The Hispanic district in the Urban League's map, as submitted to this Court has a Hispanic population of 63.8%. A similar map was also proposed by the Collins/Hayes plaintiffs.

EXCERPT FROM THE REPORT OF CHRISTOPHER CLEVELAND ON SPLIT POLITICAL SUBDIVISIONS

Split Political Subdivisions

Congressional District	Number of areas that were split					
	Counties	Townships (census MCDs)	Cities (census places)	Census Tracts	1990 Precincts	1990 Wards
01	1	2	4	45	67	15
02	1	6	19	13	36	9
03	1	9	22	28	56	5
04	1	8	18	116	218	20
05	1	4	10	71	111	14
06	2	8	27	24	39	1
07	1	6	11	75	105	19
08	2	2	22	12	13	NA
09	1	3	5	22	29	8
10	2	1	10	10	8	NA
11	4	7	26	23	29	1
12	2	2	6	14	8	NA
13	3	5	23	14	22	NA
14	2	1	15	6	3	NA
15	2	2	6	9	5	NA
16	1	1	6	5	3	NA
17	2	2	3	12	7	NA
18	3	6	8	19	30	NA
19	3	2	5	12	8	NA
20	4	6	12	35	32	NA
Average	1.95	4.15	12.90	28.25	41.45	10.22



Split Precinct Statistics (1990 VTDs)

Cong Dist	Total precincts in or split by the district	Split precincts	% of precincts that were split	Population	Population in split portion of district	% of district's population living in split areas
01	717	67	9%	571,530	26758	5%
02	548	36	7%	571,530	16323	3%
03	622	56	9%	571,531	29698	5%
04	423	218	**52%**	571,530	120584	**21%**
05	598	111	19%	571,530	61124	11%
06	442	39	9%	571,530	19432	3%
07	653	105	16%	571,530	50779	9%
08	431	13	3%	571,530	6774	1%
09	565	29	5%	571,530	12134	2%
10	523	8	2%	571,530	3855	1%
11	428	29	7%	571,530	18380	3%
12	399	8	2%	571,530	6177	1%
13	372	22	6%	571,531	10455	2%
14	387	3	1%	571,530	388	0%
15	386	5	1%	571,530	1255	0%
16	385	3	1%	571,530	759	0%
17	363	7	2%	571,530	4446	1%
18	481	30	6%	571,530	12778	2%
19	471	8	2%	571,530	5260	1%
20	424	32	8%	571,530	16518	3%

PERCENTAGE OF POPULATION IN SPLIT PRECINCTS -
PLAINTIFF'S EXHIBIT 53

DIRECT EXAMINATION TESTIMONY OF PLAINTIFF'S WITNESS, MANUEL TORRES

[344] Q: And as a campaign activist, you find it difficult to work this kind of election where the boundaries are so jagged, is that it? A: Absolutely right. It's too confusing. The people, the workers, it's too hard to manage a campaign when you don't know exactly where the boundaries are. It's even more difficult when the voters themselves are not aware that they are in those kinds of boundaries.

CROSS EXAMINATION TESTIMONY OF PLAINTIFF'S WITNESS, MANUEL TORRES

[349] Q: Now, the 1992 campaign was the first election under the lines of the 4th Congressional District as it currently stands, right? A: Yes. Q: And when you went campaigning, did you advise people that they were in the 4th Congressional District? A: If we knew, we did. If we didn't, it was confusing. A: So you campaigned even though you didn't know what congressional district you were going to be in. A: The problem with the 4th congressional district was that it was so jagged on the edges. In particular, you know, one side of the street was in, or half the precinct was in. The neighbors didn't know -- the neighbors didn't even realize if they were in or out. * * * Q: Is it your position that precincts were split in the 4th Congressional District in the 1992 election? A: Yes, there were some split precincts. Q: And you were a precinct captain at the time? A: No. Q: You were just a campaign worker. A: Yes. Q: And you were able to give them information about the congressional district? A: In terms of the issues. Q: Or in terms of whether or not they reside in the congressional district. A: If I had that information, I would give it. I would give it to them if we knew definitely, but it was somewhat confusing. Q: If you knew at the time. A: If I knew at the time.

EXCERPT TEXT OF CROSS EXAMINATION TESTIMONY OF DEFENSE WITNESS JAMES LEWIS

[659] BY MR. MARKHAM:

Q: Would another effect of a connector of this sort be that there would be some precincts in which there would be very few voters? A: There are -- well, I don't know -- I don't know the rules by which precincts are drawn. They may have to include voters if they are indeed precincts. I don't have information to that effect. Q: And if there are precincts that have 6 or 10 or 12 people, it would be possible if few enough of them would participate in the election and if they all voted for the same candidate, that they would effectively lose the secrecy of their ballot, would they not? A: I mean that's a hypothetical. I don't know whether that in effect exists. I suppose if there were a precinct with so few people, I suppose that is hypothetically possible. Q: I would like to show you what we have marked as Plaintiff's Exhibit 57. * * * Q: And I'll represent to you that these are the election results for the 1994 general election in congressional district No. 4. I would like to ask if you would -- * * * Q: If you would look at the election results that are reflected with respect to Proviso precinct No. 132 of the November 8, 1994 election, can you tell me whether all the persons who reside in that precinct and are reported in this election result voted for the same candidate in that race? * * * A: If this is indeed all the persons who voted, there is one vote cast, they would have voted for that candidate, that's correct. Q: And if that information is public with respect to who that person is, that person has effectively lost the secrecy of their ballot? If that information is available -- A: If that information is public and their name is identified, that would be correct. Q: And similarly, in Stickney precinct No. 40, the election results for that contest reflect that all persons who cast ballots in the Gutierrez-Valtierra race in November 8, 1994, in that precinct voted for the same candidate, did they not? A: According to this, that's correct. Q: And the vote reflects a two to nothing vote? A: Right.

EXCERPT FROM PLAINTIFF'S EXHIBIT 57

General Election, Cook County, Illinois
Tuesday, November 8, 1994

***

Representative in Congress - 4th
07 (Dem) Luis Gutierrez
08 (Rep) Steven Valtierra

***

	07	08
***		
Proviso 132	1	0
***		
Stickney 40	0	2

EXCERPT FROM THE REPORT OF CHRISTOPHER CLEVELAND ON CITIZENSHIP

In *Hastert v. State Board of Elections*, the Federal District Court agreed with both the plaintiffs and the defendants that a congressional district is considered a "safe" seat if the particular minority is constitutes 65% of the population or 60% of the voting age population (VAP). Safe seats are commonly defined in this way.

I examined the fourth congressional district to determine if Hispanics could effectively form a 65% or 60% voting majority. I found that they could not, given that only citizens vote, and that a substantial portion of Hispanics in the City of Chicago are not citizens.

Citizenship in the City of Chicago (VAP)	
Citizens*:	1,807,120
Hispanics:	345,307
Hispanic Citizens*:	194,438
Percent of Hispanics who are Citizens:	56.30%

Citizenship in the fourth congressional district:

	Total	Hispanic	Percent Hispanic
Persons	571,530	371,663	65.03%
VAP	383,497	226,974	59.19%
VAP Citizens*	270,839	120,850	44.62%

I found that eligible Hispanic voters constitute less than half of the total eligible voters in the fourth congressional district. Hispanics are actually a voting minority in the fourth.

---

* Based on Census Bureau special tabulation. Data is for block groups which do not correspond exactly with city or congressional boundaries. An allocation algorithm was used. Total estimated error is < 1%.

Other Districts

I found that several of the other districts that Dr. Lichtman identified as Hispanic-majority are actually Hispanic minority when citizenship is taken into account.

District	Percent Hispanic in the Lichtman report	Percent VAP Hispanic including citizenship
Circuit Court, 6	51%	43%
Circuit Court, 14	51%	33%
Fourth CD	60%	45%
County Commission 7	57%	38%
County Commission 8	57%	48%
12th Ward	66%	44%

Variation in Citizenship Rates

The percentage of Hispanics who are citizens varies widely across the city, from a low of 20-30% in some 12th Ward precincts to 100% in some 1st Ward precincts.

DIRECT EXAMINATION TESTIMONY OF CHRISTOPHER CLEVELAND

[160] Q: What percent of the 4th Congressional District is Hispanic? A: Well, based upon total population, it's approximately 65 percent. Based upon voting age population, it's almost 60 percent, 59 point something percent. Based upon citizenship data, it's under 45 percent.

REDIRECT TESTIMONY OF CHRISTOPHER CLEVELAND

[293] A: 45 percent of the 4th Congressional District is comprised of Hispanic citizens, voting age population citizens. . . . Now, I should add a caveat to that, * * * that actual number is actually considerably lower than that. That was actually an upper balance when I calculated both for various reasons.

* * *

[294] The problem is overreporting of citizenship among Hispanics. There is known problem that the Census Bureau has published on which is that frequently non-citizens, it's a self-reported citizenship rate. Non-citizens overreport their citizenship.

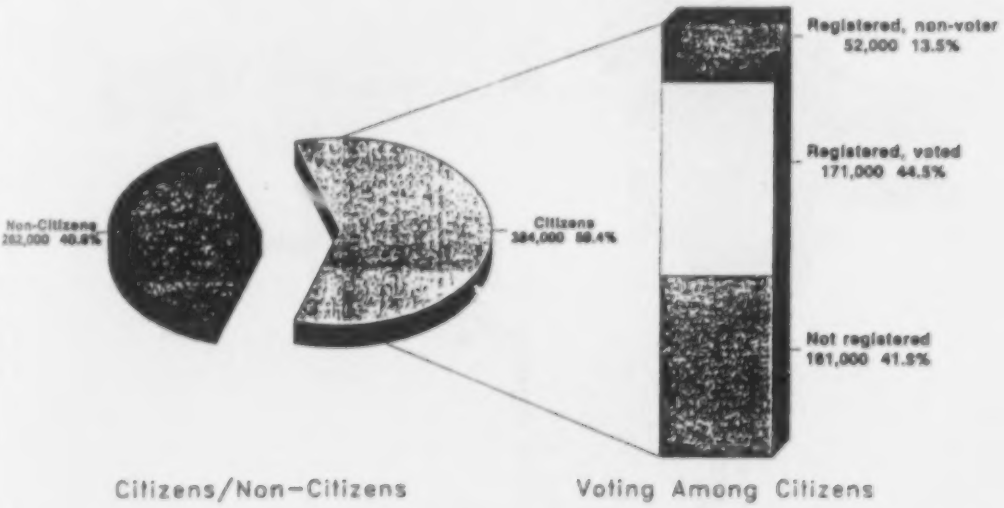
DIRECT EXAMINATION TESTIMONY OF CHRISTOPHER CLEVELAND

[689] Q: Did you confirm your citizenship estimates against any other sources? A: I did. I came across a Latino Institute Report *** Q: And what are your conclusions in respect to it? A: I found that at least with regard to the citizenship calculations or the calculations that I did, our numbers are pretty much in sync. They pretty much line up. These are for 1992 data. I used 1990, but still it is pretty close. Q: And what does this report indicate then? Q: It just talks about the percentage of citizens, amongst other things, amongst Latinos in the Chicago area. It finds [690] that citizens are 59 percent in Illinois. I had found that they were 56 percent in Chicago. It is pretty close.

EXCERPT FROM PLAINTIFF'S EXHIBIT 56 - LATINO INSTITUTE INFORMATION ON CITIZENSHIP

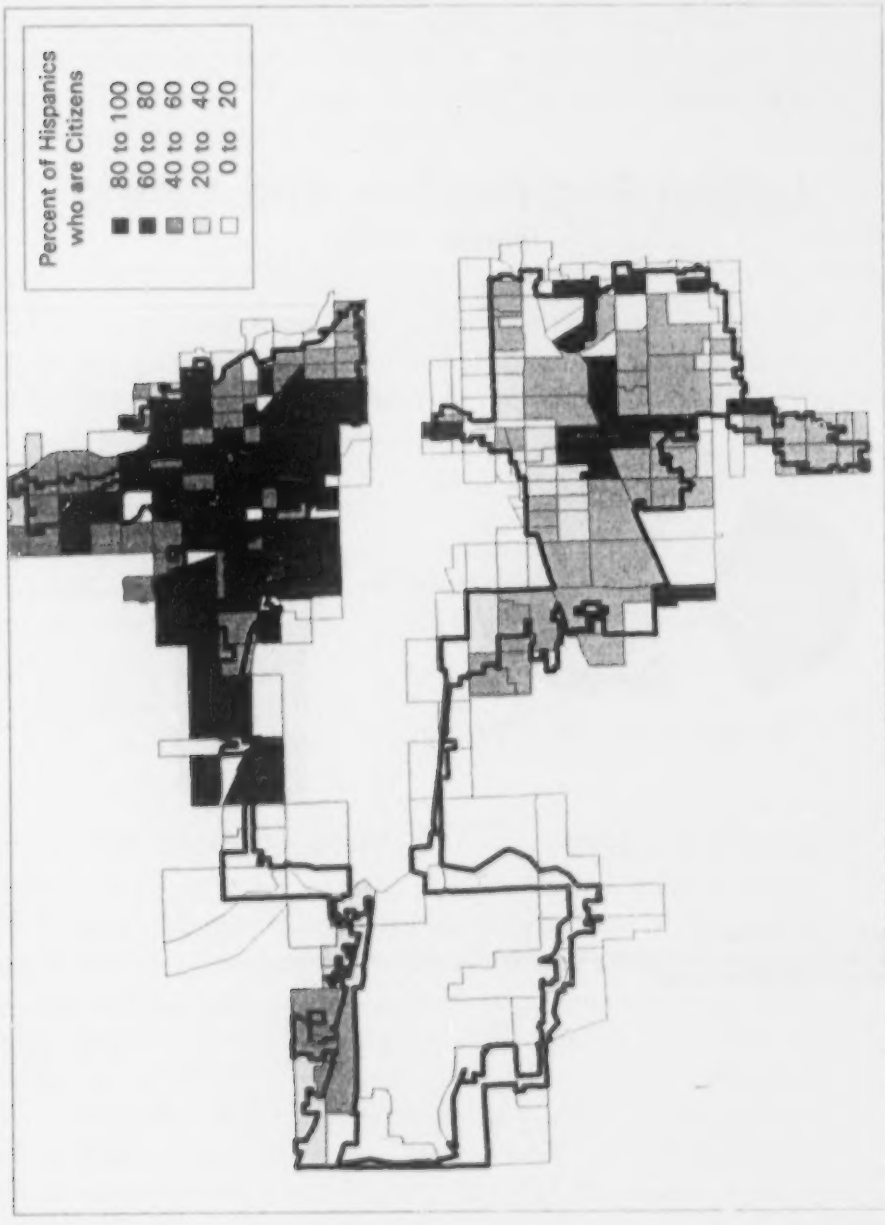
Latino Registration and Voting

Illinois: 1992



Universe: 646,000 Latino Adults
Source: 1992 Current Population Survey; 1990 Census Public Use Microdata Samples
LATINO INSTITUTE RESEARCH, 1994

PLAINTIFF'S EXHIBIT 30, PERCENT OF HISPANICS WHO ARE CITIZENS



EXCERPT FROM DEFENDANT INTERVENORS EXHIBIT 22, PAGE 10

One of the reasons why the percentage of Latino registered voters is so low is that it is not sufficient to be 18 years old to register, one must also be a U.S. citizen. Thus, although there are substantial numbers of Latinos in Chicago who are at voting age, we estimate that 44 percent of the 1986 Latino population in Chicago 18 years and older are ineligible to participate in the electoral process for lack of U.S. citizenship status.

The ineligible groups are composed of both individuals who currently hold permanent resident visas and also undocumented workers. The number of legal residents is estimated to be very significant among Latinos in Chicago. The Immigration and Naturalization Service (INS) reported 68,665 Hispanic resident aliens in 1980 representing 16 percent of Chicago's Latinos.

EXCERPT FROM DEFENDANT INTERVENORS EXHIBIT 55, PAGE 102

1994 Metro Report
MCIC Table #24

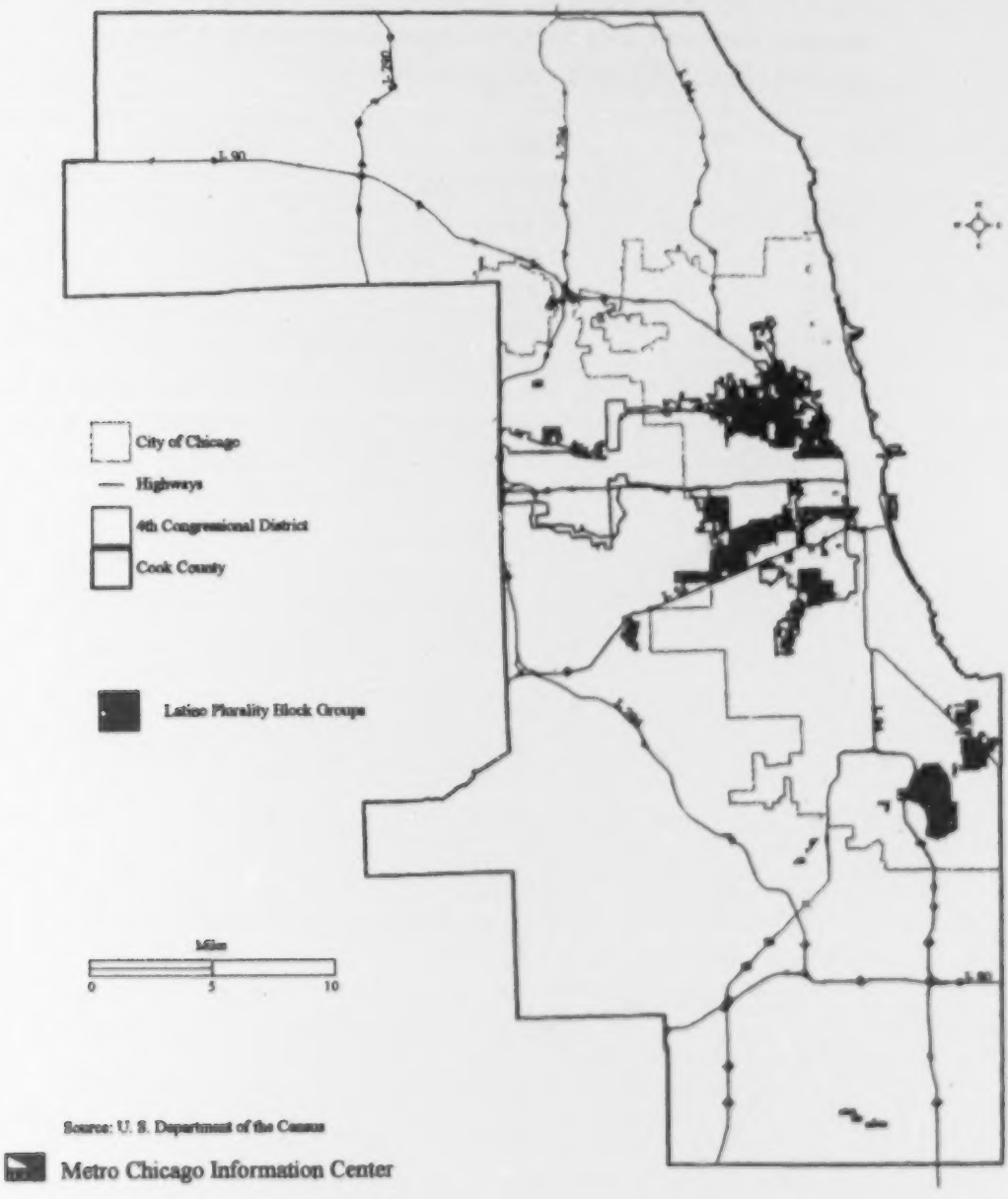
		Race		
* * *	* * *	White	Black	Latino
U.S. Citizenship		98%	98%	61%

EXCERPT FROM DR. D. GARTH TAYLOR'S REPORT -
DEFENDANT INTERVENOR EXHIBIT 6
PAGE 8-9

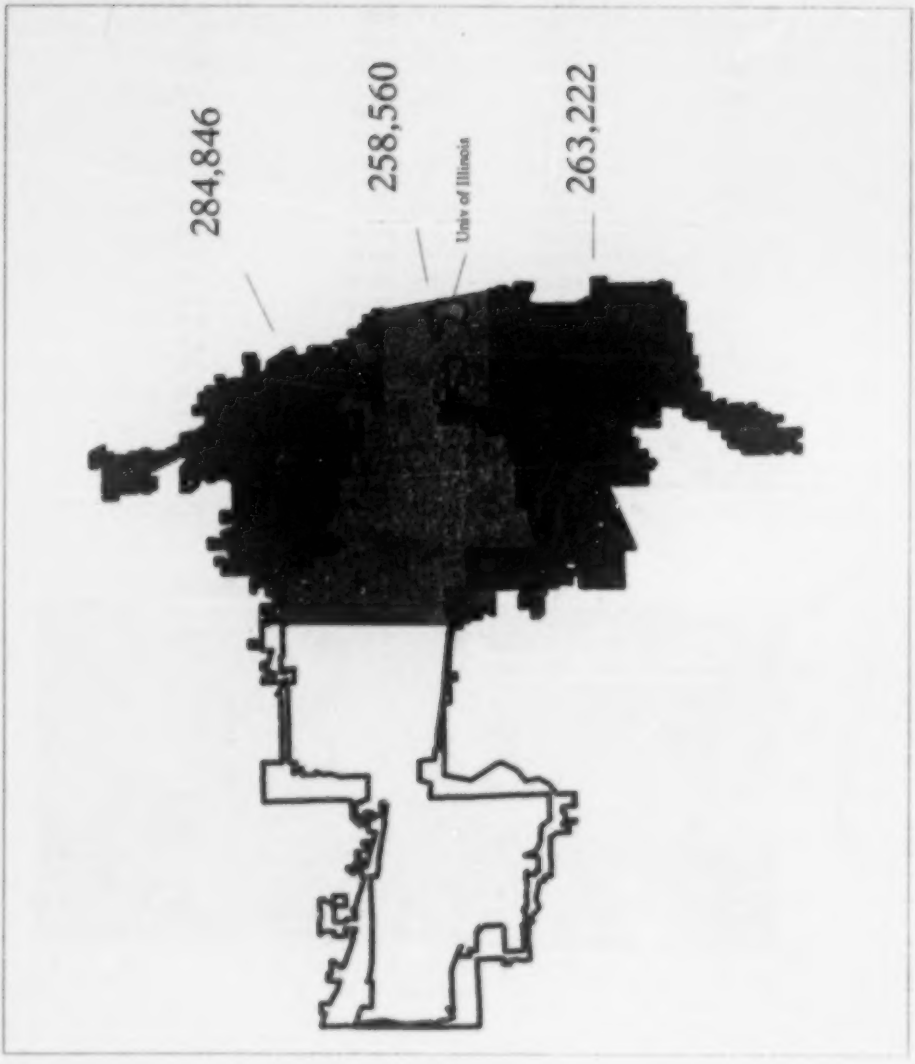
51. * * * According to the U.S. Immigration and Naturalization Service, the number of Mexican-Americans who have been granted citizenship each year since 1990 is:

	Granted Citizenship
1990	2,112
1991	1,171
1992	1,105
1993	3,491
1994	3,498

EXCERPT FROM DR. D. GARTH TAYLOR'S REPORT - DEFENDANT INTERVENOR EXHIBIT 6 MAP OF HISPANIC PLURALITY BLOCK GROUPS



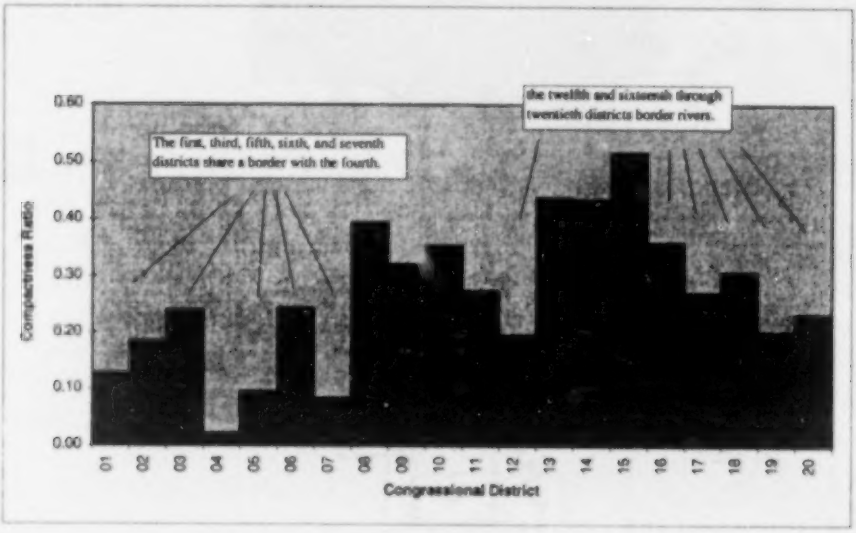
PLAINTIFF'S EXHIBIT 29, MAP OF THE POPULATION BETWEEN THE "ISLANDS" OF HISPANIC POPULATION



EXCERPT FROM THE REPORT OF CHRISTOPHER CLEVELAND ON COMPACTNESS

Compactness of Illinois Congressional Districts
(not adjusted for natural borders)

District	Area (square miles)	Perimeter (miles)	Compactness Ratio
01	56.81	74.61	0.13
02	127.94	92.91	0.19
03	127.54	81.50	0.24
04	39.76	151.31	0.02
05	52.77	83.15	0.10
06	184.87	97.49	0.24
07	51.50	87.63	0.08
08	453.71	120.13	0.40
09	53.76	45.82	0.32
10	246.09	93.37	0.35
11	2629.04	346.44	0.28
12	3610.57	480.70	0.20
13	410.42	108.48	0.44
14	2460.13	266.58	0.44
15	7510.38	427.26	0.52
16	3128.14	330.36	0.36
17	8459.31	624.44	0.27
18	6259.96	505.37	0.31
19	10840.51	818.87	0.20
20	9591.81	715.31	0.24
Average	2814.75	277.59	0.27



HISPANIC POPULATION CHANGE 1980-1900
DEFENDANT-INTERVENOR EXHIBIT D-I 9

REGION	1980 Pop.	1990 Pop.	Change Number	Change Percent
Cook County	499,319	694,194	194,875	39%
Chicago	422,052	545,852	123,800	29%
Suburbs	77,267	148,342	71,075	92%
Other N.E. IL	85,553	149,658	64,105	75%
Lake	21,064	38,570	17,506	83%
McHenry	3,020	6,066	3,046	101%
Boone	1,240	2,065	825	67%
DuPage	17,293	34,567	17,274	100%
Kane	26,113	43,535	17,417	67%
DeKalb	1,405	2,329	924	66%
Will	13,778	19,973	6,195	45%
Kendall	1,124	1,805	681	61%
Grundy	511	748	237	46%
Other Counties (92)	50,730	60,594	9,864	19%
Total Illinois	635,602	904,446	268,844	42%

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES R. KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	95 C 827
	)	
STATE BOARD OF ELECTIONS, DAVID E. MURRAY, LAWRENCE E. JOHNSON, HANNELORE HUISMAN, JUDITH JONES, LANGDON D. NEAL, THERESA M. PETRONE, and WANDA REDNOUR,	)	Hon. David H. Coar Hon. Charles R. Norgle, Sr. Hon. Michael S. Kanne
	)	
Defendants,	)	
	)	
and	)	
	)	
UNITED STATES OF AMERICA, BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ, and THE CHICAGO URBAN LEAGUE,	)	
	)	
Defendant Intervenors.	)	

TRIAL BRIEF OF PLAINTIFF

I. INTRODUCTION

The Plaintiff shall address three different issues for the court in this brief: 1) the Plaintiff's standing in this matter, as opposed to his possible standing in the litigation of Hastert v. State Board of Elections; 2) the standard of judicial review in this matter; and 3) the predominance of the Fourteenth Amendment of the U.S.

Constitution over any interpretation of §2 of the Voting Rights Act.

II. PLAINTIFF JAMES R. KING HAS STANDING TO SUE, AS HE WAS NOT A PARTY TO THE LITIGATION OF HASTERT V. STATE BOARD OF ELECTIONS, ET AL.

The Defendant intervenors and the Democratic National Committee ("DNC"), amici curiae intervenors, have asserted that the Plaintiff may not challenge the Congressional plan adopted by the Federal District court in 1991 in Hastert v. State Board of Elections, et al., and in support equate the standing of the State of Illinois with that of the Plaintiff. As argued in the Plaintiff's response to the State's Motion to Dismiss, which this court denied, the order in Hastert binds only the parties to that proceeding.

The DNC fails to see that, according to basic rules of civil procedure, a person cannot be bound by an order of a court in a subsequent proceeding except by collateral estoppel or res judicata. There is no other way, without limitation, that the Plaintiff could be bound by the order entered in Hastert. The DNC does not even address the issue, and consequently has not cited any cases which show an exception to this general rule.

One of the elements of the applicability of collateral estoppel or res judicata is that the party suing or defending be a party or have been in privity with a party in the prior proceeding. The Plaintiff, in order to be bound by that order, therefore, would had to have been either (a) named parties to the proceeding, (b) in privity with a party in the proceeding, or (c) members of a class action who did not opt out of the class. The DNC has alleged none of the above, nor could the above be shown to have occurred.

III. WHERE THE STATE MAKES A RACE BASED CLASSIFICATION, THAT CLASSIFICATION, REGARDLESS OF WHICH AGENCY OR OTHER GOVERNMENTAL BODY APPROVED OR CREATED IT, IS SUBJECT TO STRICT SCRUTINY.

The DNC has argued that since this is a court drawn plan, it cannot be subject to strict scrutiny, citing to the language of Miller v. Johnson, 1995 U.S. 4462 respecting the burden on the "legislature" to avoid subverting traditional districting principles to race-based considerations. Under the "legislative" standard the DNC would deny the Plaintiff the burden traditionally imposed upon race-based classifications. Race-based classifications have been subject to strict scrutiny in contexts where other than legislatures have created them. See, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (Federal Agency), and Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) (commission). Equal protection scrutiny has been applied in the context of judicial action. See, Powers v. Ohio, 499 U.S. 400 (1991) ("We reject . . . the view that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment. . . . The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system."). Further, it is important to note that the court in Hastert did not draw the plan itself; it merely approved a plan a majority of which was agreed upon by the parties, which makes it less judicial action as what occurred in DeWitt.

The DNC also cites DeWitt v. Wilson, 856 F.Supp. 1409 (E.D. Cal. 1994) (aff'd in part and appeal dismissed in part, 63 U.S.L.W. 3917, (1995) in support of their position. DeWitt was affirmed by the U.S. Supreme Court because the districts therein were drawn according to traditional districting principles. See, Dewitt at 63 U.S.L.W. 3917, (1995). The DeWitt case specifically and explicitly stated that it would not take a position on whether strict scrutiny would apply, and then, even if it did, the plan would pass strict scrutiny:

> We conclude that in the context of redistricting, where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, that strict scrutiny is not required. However, if it were required, we conclude that this California

redistricting plan has been narrowly tailored to meet a compelling state interest.

Id. at 1415. The Supreme Court summarily affirmed without comment. To imply from DeWitt that strict scrutiny does not apply in the instant case is tenuous, *at best*, and does not form an adequate legal foundation for this court to forego trial or otherwise hinder the progress of this case.

IV. SECTION 2 OF THE VOTING RIGHTS ACT MUST BE CONSTRUED IN LIGHT OF THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Section 2 of the Voting Rights Act ("VRA") is referred to in Miller exclusively as a "vote dilution" claim, separate and apart from a claim under Shaw. See Miller at slip. op. 20. At the same time, the Court did not intend to eliminate a §2 claim pursuant to Gingles. For instance, the Court cites Growe v. Emison 113 S.Ct. 1075, 1076 for the proposition that "racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of §2." Shaw at 2830.

A. It is Not Possible to assert §2 of the Voting Rights Act as a Compelling interest justify the drawing of a Bizarre district where a Significant Number of Voters were placed within or without its borders on the basis of race.

In Shaw the Appellees asserted two things in defense of the challenged district: first, the plan was enacted to avoid violation of §2, as construed in Gingles. Secondly, and alternatively, the plan "advanced a compelling state interest entirely distinct from the VRA," i.e. under the Fourteenth Amendment. The opinion left the issue surrounding avoiding violation of §2 open for remand. Shaw provides guidance generally, however: "courts must bear in mind the difference between what the law permits, and what it requires." Id. at 2830.

Under Gingles the requirements for a stating a case under §2 are 1) that the minority be sufficiently large and compact 2) the white majority sufficiently votes to usually defeat the minority's candidate of choice, and 3) the minority is politically cohesive. The Court in Miller clarified the Gingles decision by stating what the Fourteenth Amendment requires. Miller said that the state must draw its districts according to race-neutral principles, such as compactness, contiguity, respect for political subdivisions or communities of actual shared interests. Therefore, under the 14th Amendment race may not be the predominant factor in drawing a map; the map must be compact, and be shown to follow race-neutral factors.

B. Interest under the 14th Amendment to "eradicate the effects of Past Discrimination"

The Shaw Court acknowledged that the state has a "significant state interest in eradicating the effects of past racial discrimination." Shaw at 2831. The Court continued to say, however: "[b]ut the State must have a strong basis in evidence for [concluding] that remedial action is necessary." Shaw at 2832. The State appellees defending the challenged district asserted two pieces of evidence of past discrimination: 1) §5 preclearance requirements placed upon 40 of North Carolina's counties, and 2) findings, in accordance with Gingles, "of a long history of official racial discrimination . . . and pervasive racial bloc voting. . . ."

In response the Court said 1) that only 3 Justices said in UJO that states had a significant state interest apart from VRA (i.e. under the 14th Amendment) to minimize the consequences of racial bloc voting; and 2) most importantly, those justices "specifically concluded that race-based districting, as a response to racially polarized voting, is constitutionally permissible only when a State `employ[s] sound districting principles' and only when the affected racial group's `residential patterns afford the opportunity of creating districts in which they will be in the majority.'" Id.

The Court apparently is concerned about creating parallel remedies under both §2 and the Fourteenth Amendment. The remedy under the Fourteenth Amendment has been defined by

Congress in § of the Voting Rights Act. At the same time, however, it is necessary to review vote dilution and racial gerrymandering claims under both theories: what §2 requires, and what 14th Amendment allows. The 14th Amendment, at this stage, forms the limit of the remedy under Gingles.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES R. KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	95 C 827
	)	
STATE BOARD OF ELECTIONS, DAVID E. MURRAY, LAWRENCE E. JOHNSON, HANNELORE HUISMAN, JUDITH JONES, LANGDON D. NEAL, THERESA M. PETRONE, and WANDA REDNOUR,	)	Hon. David H. Coar Hon. Charles R. Norgle, Sr. Hon. Michael S. Kanne
	)	
Defendants,	)	
	)	
and	)	
	)	
UNITED STATES OF AMERICA, BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ, and THE CHICAGO URBAN LEAGUE,	)	
	)	
Defendant Intervenors.	)	

ADDITIONAL TRIAL BRIEF OF PLAINTIFF

This court requested that the Plaintiff respond to the arguments of the Democratic National Committee and Department of Justice (hereinafter referred to as "Defendants") on the issues regarding the standing of the Plaintiff to challenge the previous court-ordered plan in the case of Hastert et al. v. State Board of Elections; and consequently, what changes, if any would result upon the Plaintiffs proof, and more particularly, how the Defendants would be permitted to frame their proof.

I. DEFENDANTS' ARGUMENT THAT PLAINTIFF IS SEEKING TO MODIFY A PREVIOUS COURT ORDER IS UNFOUNDED.

Defendant-Intervenors assert that "the plaintiff is seeking to modify the Hastert order, and should not be allowed to relitigate the findings of the Hastert court and question the admissibility of the Hastert evidence . . ." and that somehow this works as a "procedural sleight of hand." Defendant-Intervenor's Brief, pp. 20. By making this argument, the Defendant-Intervenors are asserting that this Court make the unfounded presumption that the Plaintiff has standing to modify the order in the first place.

The Plaintiff has no standing to modify the Hastert order under Federal Rule 60(b). As the Plaintiff addressed in his Response to the State Board of Elections Motion to Dismiss, the Plaintiff cannot, even if he so desired, seek to modify the order in Hastert. Federal Rule 60(b) says in plain lanuage that only parties or their privies may seek such relief. Rule 60(b) begins by saying: "On motion and upon such terms as are just, the court may relieve *a party or a party's legal representative* from a final judgment, order, or proceeding . . . ." Id. (emphasis added). This concept is confirmed by the case law.

In National Acceptance Company of America, Inc. v. Frigidmeats, Inc., 627 F.2d 764 (7th Cir. 1980) where a creditor, not a party to the proceedings, sought relief under Rule 60(b) to vacate a turnover order of a Bankruptcy court, the Seventh Circuit said that denial of the relief was appropriate because "[i]t is well settled that . . . `one who was not a party lacks standing to make [a 60(b)] motion." Id. at 766 (brackets in original). See, also, U.S. v. West Willow Apartments, Inc., 245 F.Supp. 755 (D.C.Mich. 1965), and 11 Wright, Miller & Kane §2865 (1995) (with the exception of a privity of a party, one who was not a party lacks standing to make the motion under Rule 60).

Defendants do not cite any authority for Plaintiff having standing to assert his claim in the Hastert litigation; they seek to assert a remedy which the Plaintiff cannot exercise. Department of Justice cites Donohoe v. Consolidated Operating & Production, 30 F.3d 907 (7th Cir. 1994) as relevant. In that case, however, the

court discussed the "law of the case" doctrine, which is without applicability here. Id. at 910. A trial court applying the "law of the case" doctrine will treat a determination of law, once made, as correct "throughout all subsequent proceedings except when the issue is raised in a higher court." Law Dictionary, Barrons, 1984.

Department of Justice is apparently asserting that the "law of the case" of Hastert applies to the instant case. This assertion presumes first, however, that the Hastert action and the instant case are the same matter which, even as matters stand now, they are not. And, second, this assertion also presumes that the Plaintiff James King was a party to Hastert, which he was not.

II. PLAINTIFF, JAMES R. KING, AT ALL TIMES AFTER THE ORDER ENTERED IN HASTERT ET AL. V. STATE BOARD OF ELECTIONS, WAS PERMITTED TO FILE HIS OWN ACTION.

Plaintiff James R. King's lack of standing to modify the order in Hastert, in turn, does not preclude him from filing a separate and distinct action. The Supreme Court's opinion in Martin v. Wilks, 409 U.S. 753, 109 S.Ct. 2180 (1989) is on point. In Martin, a group of black individuals filed suit against the City of Birmingham, Alabama and county board for racially discriminatory hiring and promotion practices; eventually a consent decree was entered which set forth a remedial scheme. Id. at 2183. Subsequently, a group of white firefighters, brought suit separately against the City and county board for making race-conscious employment decisions; the black individuals in the prior case were granted leave to intervene in that case. Id. Each of these were different titled suits. Id. The District Court entered a motion to dismiss, concluding that

> if in fact the City was required to [make promotions of blacks] by the consent decree, then they would not be guilty of [illegal] racial discrimination' and that the defendants had `establish[ed] that the promotions of the black individuals . . . were in fact required by the terms of the consent decree.'

Id. at 2184.

The Eleventh Circuit reversed saying "[b]ecause . . . [the Wilks respondents] were neither parties nor privies to the consent decrees, . . . their independent claims of unlawful discrimination are not precluded." Id. The Supreme Court affirmed saying

> All agree that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." . . . This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4449 p.417 (1981). . . . A judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings.

Id. at 2184.

In the instant case, a prior order was entered in Hastert regarding the configuration of the Illinois Congressional plan, to which there was an agreement respecting the part of the plan which the Plaintiff in the instant case is challenging, namely the Fourth Congressional District. The Plaintiff, James King, filed an independent and separate action apart from Hastert over three (3) years later challenging that plan on both grounds that were covered by the Hastert court, in addition to the Constitutional grounds.

The Defendants are asserting that this Court, like the district court in Martin, in effect, make the same determination with respect to the order entered in Hastert: 1) hold that it is unassailable, and 2), that the Plaintiff is bound by that order. In the instant case the Plaintiff did in fact properly follow the rules of procedure by filing an independent and separate action, to which he is fully entitled according to the Court in Martin. See, also, U.S. v. City of Chicago, 978 F.2d 325 (7th Cir. 1992) ("In general, a judgment or decree among parties to a lawsuit does not bind a third party who has not been made a party to the litigation."); Cf., Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986)("parties who choose

to resolve litigation through through settlement may not dispose of the claims of a third party . . . without that party's agreement.")

Further, like the Defendants in the instant case, the Petitioners in Martin contended that "the possibility for inconsistent judgments exists". Id. at 2187. The Court rejected this saying that acceptance of this argument "would require a rewriting rather than an interpretation of the relevant Rules. . . . [W]e are not persuaded that [its] acceptance would lead to a more satisfactory method of handling cases like these." Id.

It is also important to note that the petitioners in Martin, like the Defendants in the instant case, asserted that "because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an impermissible `collateral attack.'" Id. The Supreme Court rejected this argument, quoting Justice Brandies in Chase National Bank v. Norwalk, 291 U.S. 431, 54 S.Ct. 475 (1934):

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights. Id. at 441, 54 S.Ct., at 479.

Id. at 2185. The arguments of Defendants should be rejected on the same grounds. It would have been feasible for the Plaintiff to file, but at the same time, the Plaintiff likely would have been bound by stare decisis, at least until the Supreme Court rendered its decision in Shaw v. Reno in 1993. See 18 Wright, Miller, & Cooper §4449 (1981).

III. IF PLAINTIFF IS NOT BOUND BY THE PRIOR ORDER ENTERED IN HASTERT, PLAINTIFF IS ENTITLED TO CHALLENGE ANY LEGAL OR FACTUAL DETERMINATION, SUBJECT TO STARE DECISIS IN A LIMITED WAY.

The Plaintiff, James R. King, would be bound by a factual finding in Hastert only if this court finds that there was collateral estoppel, or issue preclusion.

> Collateral estoppel will prevent the relitigation of an issue only when four prerequisites are met. First the party against whom the collateral estoppel is asserted must have been fully represented in the prior litigation. Second the precluded issue must be identical to the issue involved in the prior litigation. Third, the issue must have been actually litigated and decided on the merits. Finally resolution of the issue must have been necessary to the court's judgment.

Prymer v. Ogden, 29 F.3d 1208 (7th Cir. 1994). Without even addressing all the prerequisites, it is sufficient for Plaintiff to assert, as Plaintiff has elsewhere, that he was not a party to the Hastert litigation.

In Holloway v. Lockhart, 813 F.2d 874 (8th Cir. 1987), a prison inmate filed suit under §1983 alleging use of tear gas in an incident that resulted in unconstitutional injury. Id. at 875. A prior lawsuit covering the same use of tear gas, Woods v. Norris, ruled that its use was reasonable and necessary. Id. at 877. The District court granted summary judgment on behalf of the Defendants, reasoning that the findings of fact in Woods resolved any identical fact questions. Holloway at 878. As in the instant case, the Defendants are asserting that the Plaintiff is bound by the prior court order in Hastert and its findings on the issues therein.

The Eighth Circuit rejected the district court's analyis saying that the plaintiff

> cannot be collaterally estopped by virtue of a determination in another case in which he was neither a party nor in privity with another party. Applying collateral estoppel against him here would abrogate the fundamental requirement of due process: [plaintiff's] claim would have been adjudicated in Woods without his having had an opportunity to be heard. . . . The findings in Woods cannot preclude Holloway from litigating the same issues in this case.

Holloway at 878 (citations omitted). See, also Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985) (where prior criminal case

determined that there was no violation of Posse Comitatus Act, Plaintiffs were entitled to relitigate issue surrounding violation of Act where no Plaintiffs were parties to the prior criminal case); and Gilbert v. Ben-Asher, 900 F.2d 1407 (9th Cir. 1990) ("As a general matter, only persons who were parties to the prior action may be bound by *the findings* and conclusions of that action" (emphasis added)); and 18 Wright, Miller, & Cooper §4449 (1981) ("The rule that nonparties cannot be bound by a judgment ordinarily means that the judgment is not even admissible as evidence of the facts found. At the same time, the judgment carries the ordinary precedential weight of stare decisis.") Likewise this court has no authority to bind the Plaintiff to the findings made in the Hastert litigation, except to the extent that stare decisis applies.

Even in light of stare decisis, however, Plaintiff's should be given the opportunity to furnish new information regarding the findings that the Hastert court made to which the Defendants would assert that stare decisis applies to certain findings. See, Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985) ("[our previous decision] does, however, stand as a binding precedent in this Circuit on the interpretation of the Act"). In the instant case, the Plaintiff submits that the law on the understanding of §2 of the Voting Rights Act has substantially changed, to which the stare decisis of this court on that issue is no longer applicable.

In respect to the other findings of the Hastert court, for example, on past discrimination against Hispanics, the applicability of stare decisis does not preclude the Plaintiff from having his day in court, wherein the Defendants must make their showing. There must be a certain limit to which a court can exercise judicial notice of facts, which cannot be to the detriment of a litigating party. "Judicial notice is permitted of facts that are generally known within the territory of the court's jurisidiction or are capable of accurate and ready determination from a source whose accuracy is beyond a reasonable doubt." Fed.R.Evid. 201(b). The court in Holloway said

> [t]he fact that the judge made that finding in Woods [that the use of tear gas was reasonable and necessary] is a judicially noticeable fact; but that fact is irrelevant in this

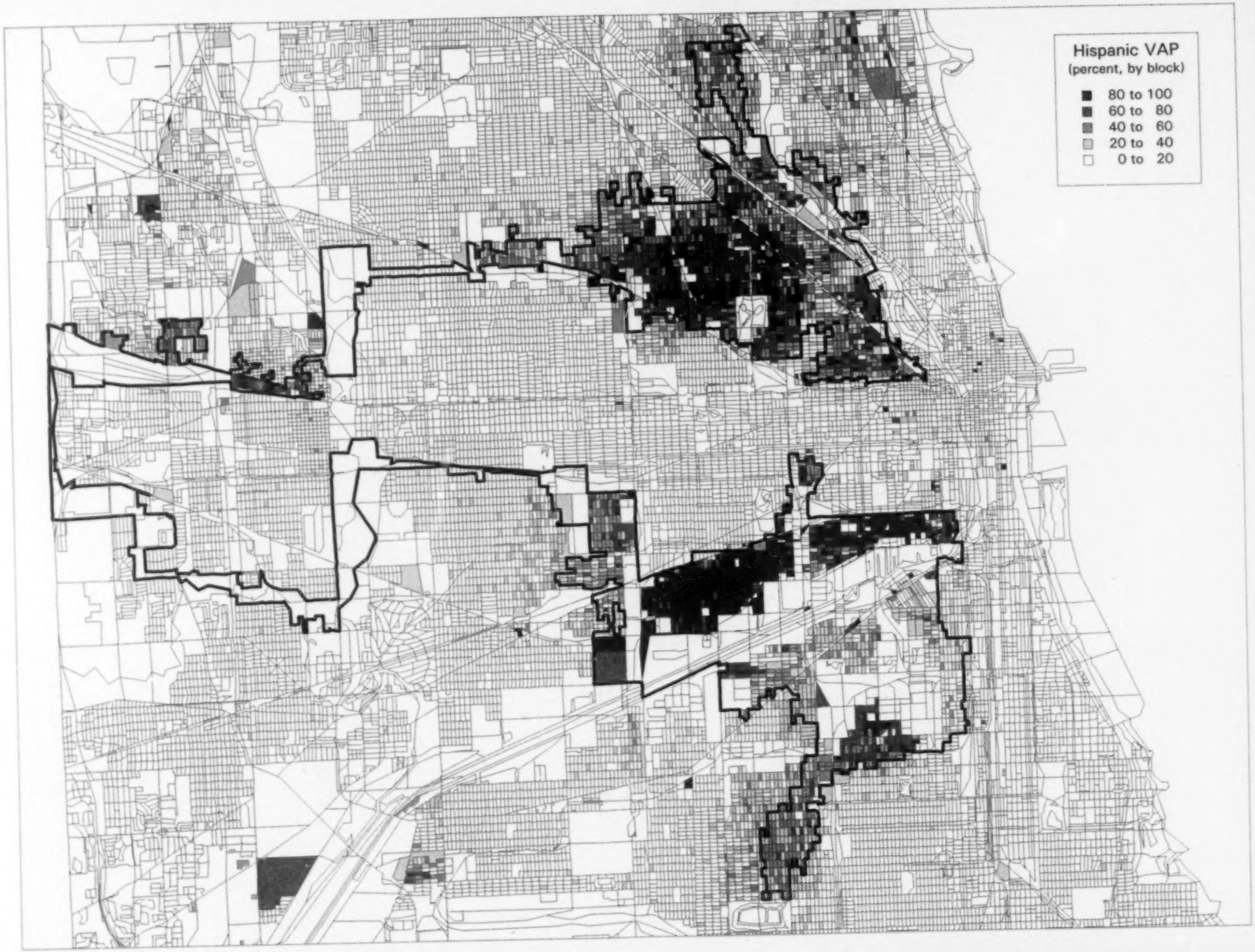
> case, unless it is used as a predicate for the application of collateral estoppel, which is inappropriate. . . . Whether the gassing was reasonable and necessary can be determined only by evaluating the testimony and credibility of various witnesses; this is not the kind of fact contemplated by Rule 201.

Holloway at 879.

For these reasons the arguments of the Defendants should be rejected, and the Plaintiff given his day in court.

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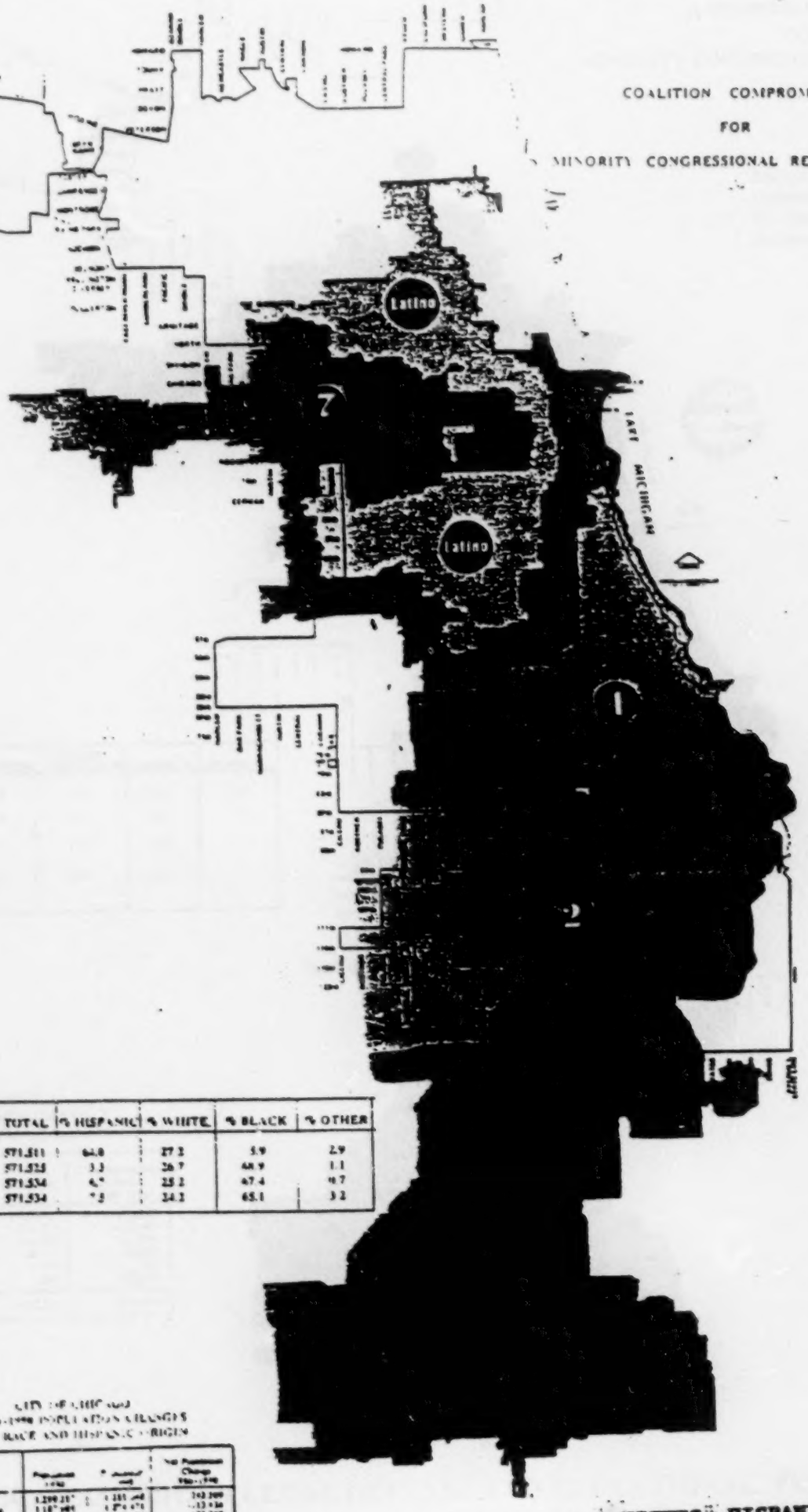

Hispanic VAP
(percent, by block)
80 to 100
60 to 80
40 to 60
20 to 40
0 to 20

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COALITION COMPROMISE

FOR

MINORITY CONGRESSIONAL REDISTRICTING



DISTRICT	TOTAL	% HISPANIC	% WHITE	% BLACK	% OTHER
Latino	571,511	64.8	27.3	5.9	2.9
1st	571,525	3.3	26.7	68.9	1.1
2nd	571,534	6.*	25.2	67.4	1.7
7th	571,534	*.3	24.3	65.1	3.2

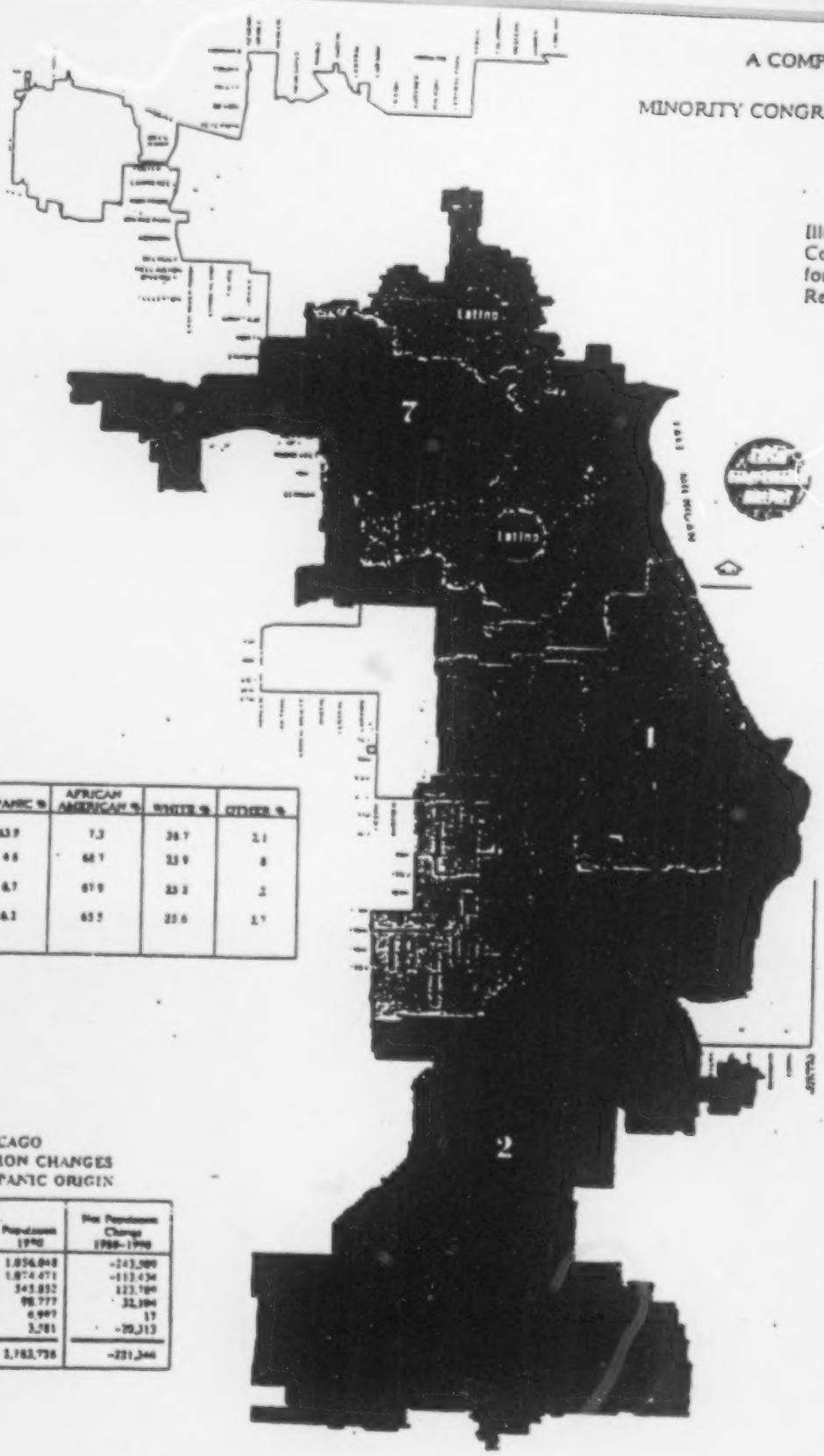
CITY OF CHICAGO
1990 POPULATION CHANGES
BY RACE AND HISPANIC ORIGIN

TOTAL			

NIEVES, HISPANIC PLAINTIFFS
EXHIBIT NO. 3

A COMPROMISE PROPOSAL
FOR
MINORITY CONGRESSIONAL REDISTRICTING

Illinois Latino
Committee
for Fair
Redistricting



DISTRICT #	TOTAL POPULATION	HISPANIC %	AFRICAN AMERICAN %	WHITE %	OTHER %
7th	571,334	63.9	7.3	26.7	2.1
4th	571,334	4.6	68.7	23.9	8
2nd	571,330	6.7	67.9	23.3	2
1th	571,329	6.2	65.5	22.6	2.7
Ideal Size	571,330				

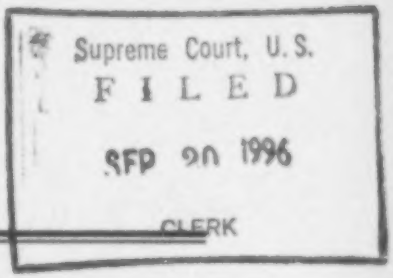
CITY OF CHICAGO
1980-1990 POPULATION CHANGES
BY RACE AND HISPANIC ORIGIN

	Population 1990	Population 1980	Net Population Change 1980-1990
White	1,299,557	1,656,048	-243,589
African American	1,187,901	1,074,671	+113,434
Hispanic	422,063	545,852	123,789
Asian	66,673	98,777	32,104
American Indian	4,588	6,997	17
Other	23,894	3,781	-20,113
TOTAL	3,005,072	3,783,736	-221,346

NIEVES HISPANIC PLAINTIFFS
EXHIBIT NO. 2

BEST AVAILABLE COPY

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
MIDWEST/NORTHEAST VOTER REGISTRATION EDUCATION PROJECT



No. 96-146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAMES R. KING,

Appellant,

v.

STATE BOARD OF ELECTIONS, *et al.*,

Appellees,

BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ AND THE CHICAGO URBAN LEAGUE,

Defendant-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

DEFENDANT-INTERVENORS' MOTION TO AFFIRM

---

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No. 96-146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAMES R. KING,

Appellant,

v.

STATE BOARD OF ELECTIONS, *et al.*,

Appellees,

BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ AND THE CHICAGO URBAN LEAGUE,

Defendant-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

DEFENDANT-INTERVENORS' MOTION TO AFFIRM

Defendant-Intervenors hereby move to affirm the judgment sought to be reviewed on the ground that it is evident that the questions raised by appellant in his Jurisdictional Statement are so unsubstantial as not to need any further argument. The decision entered on the merits below is based on law established by this Court, and there is no conflict which requires this Court's resolution.

STATEMENT OF THE CASE

Appellant's statement of the case is replete with misstatements and incomplete recitations of the underlying

facts. As a result, the statement of the case requires clarification.

This case involves a challenge to a 1991 court-ordered remedial plan which was designed to remedy proven past and present discrimination against Hispanics and African Americans in and around the City of Chicago. The plan at issue was created by a three-judge panel sitting in the case of *Hastert v. State Board of Elections,* 777 F. Supp. 634, 637 (N.D. Ill. 1991). The *Hastert* court preserved three existing African American majority districts and created the first Hispanic-majority congressional district (the Fourth Congressional District) in Illinois thereby affording a majority of the 545,852 Hispanics in Chicago the ability to elect a congressional candidate of their choice for the very first time.

Following this Court's pronouncement in *Shaw v. Reno (Shaw I)*, ___ U.S. ___, 113 S. Ct. 2816 (1993), the plaintiff in this action filed a lawsuit under the Equal Protection Clause of the Fourteenth Amendment challenging the constitutionality of the Fourth Congressional District.[1] Plaintiff King alleged that the court-ordered plan was drawn predominately on the basis of race and without compelling justification. After a trial, on March 15, 1996, the three-judge district court issued an opinion and order holding that the 1991 court-ordered Fourth Congressional District passed constitutional muster. In so holding, the three-judge court applied this Court's rulings in *Shaw I* and *Miller v. Johnson,* 515 U.S. ___, 115 S. Ct. 2475 (1995), and found that: (1) the Fourth Congressional District was "bizarrely" shaped; (2) racial considerations predominated in the drafting of the district; (3) the *Hastert* court properly found the existence of the *Gingles* preconditions in determining a violation of

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[1] Initially, plaintiffs also sought to challenge the constitutionality of the African American majority First Congressional District. However, early on in the litigation plaintiffs voluntarily dismissed this claim. J.S. App. at 3 n.3.

Section 2; (4) the existence of the *Gingles* preconditions remained in effect at the time of trial; (5) remedying a Section 2 violation is a compelling state interest; and (6) the court-ordered Fourth Congressional District is narrowly tailored. Plaintiff King appealed the decision to this Court.

A. The Fourth Congressional District.

As of 1991, the Fourth Congressional District has a population of 571,530 persons. Hispanics account for 65% of the total population and 59% of the voting age population. Over 95% of the population of the Fourth Congressional District is located in two core areas, on the northside and southside of the district. *King*, J.S. App. at 53 n.49. The remaining 4.7% of the total population is located in the "western connector" which wraps around the African American majority Seventh Congressional District. *Id.* The "western connector" was the result of an effort to avoid clear retrogression in the African American majority districts, thereby preserving the three existing African American districts mandated by the Voting Rights Act. *See, Hastert*, 777 F. Supp. at 650.

The "western connector" contains primarily vacant and unpopulated land. *King*, J.S. App. at 53 n.49. The Fourth Congressional District is the geographically smallest of any of the 1991 Illinois congressional districts. J.S. App. at 102. At its longest points, the Fourth Congressional District measures only 16 miles in width and 14 miles in length. D.I. App. at 1.[2]

B. The *Hastert* Decision.

In order to properly understand the insufficiency of the issues raised in King's Jurisdictional Statement, it is important to recount the history of the *Hastert* decision,

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[2] Hereinafter "D.I. App. at __" refers to the Appendix to Defendant-Intervenors' Motion to Affirm filed herewith.

which formed the basis for the *King* court's decision upholding the Fourth Congressional District.

The three-judge panel in *Hastert* was convened after the legislature of the State of Illinois failed to pass a reapportionment plan following the release of the 1990 census. The 1990 census revealed that the State of Illinois had lost two of its twenty-two seats in the House of Representatives. *Hastert v. State Board of Elections*, 777 F. Supp. 634, 637 (N.D. Ill. 1991). As a result, lawsuits were filed in federal court seeking to declare the then-current reapportionment plan, which was based on 1980 census data, to be unconstitutional and in violation of Section 2 of the Voting Rights Act. *Id.*[3]

During a two day trial, the *Hastert* court ordered that the parties "submit their evidence in the form of affidavits and depositions, supplemented by any maps and statistical data ... ." *Hastert*, 777 F. Supp. at 639-40. Each party was able to submit one proposed reapportionment plan to the court for consideration. As part of this process, the parties were able to reach stipulations on a number of factual matters including a stipulation that "the population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority

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[3] Five lawsuits were filed. Members of the Republican Party filed the original lawsuit. Later, Hispanic residents and African-American residents filed a second lawsuit. The third lawsuit was filed by a group representing the Democratic Party. Representative Cardiss Collins, the incumbent congressman of the Seventh Congressional District, filed the fourth lawsuit, and the fifth lawsuit was filed by the Chicago Urban League on behalf of voters residing in the then-existing majority African-American districts. The court consolidated all five lawsuits for trial.

district." The parties also ultimately submitted two proposed Hispanic majority configurations for the court's review.[4]

Although the parties stipulated to the creation of a Hispanic majority district, the *Hastert* court nonetheless undertook a thorough review of the evidence to determine whether the proposed plans were a legal remedy to a Section 2 violation. *Hastert*, 777 F. Supp. at 640. The proposed plans submitted by the parties were almost identical with respect to the proposed majority Hispanic district: two dense Hispanic population concentration areas in the City of Chicago located north and south were linked together via a western connector that was substantially unpopulated. *Hastert*, 777 F. Supp. at 646. The *Hastert* court assessed the proposed plans both under federal constitutional standards and Section 2 of the Voting Rights Act. *Id.* at 640.

1. The *Hastert* Court's Constitutional Analysis.

The *Hastert* court found that the proposed plans adhered to the "one person, one vote" principle. *Hastert*, 777 F. Supp. at 644. The plans were also evaluated to determine whether either had the discriminatory effect of diluting minority voting strength. *Id.* at 645. The *Hastert* court also examined the partisan political fairness of the proposed plans. The court found that the court-ordered plan was "politically fair." *Id.* at 659.

2. The *Hastert* Court's Section 2 Determination.

Applying the three preconditions articulated in *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766 (1986), the three-judge panel of the *Hastert* court

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[4] Initially, given the "significant political ramification of the creation of an Hispanic district," several "radically different" configurations for an Latino district were originally proposed. However, before trial the parties had agreed on the general configuration of the Latino majority district. *Id.* at 640.

reviewed the evidence submitted in the case and made a number of factual determinations. The *Hastert* court concluded that the Hispanic community was sufficiently large and geographically compact to constitute a majority in a single district. *Hastert*, 777 F. Supp. at 649. The 1990 census figures revealed that the Hispanic population in the City of Chicago increased by 29% to 545,852 and the Hispanic population in Cook County increased by 39% to 694,194. The court found that the Hispanic population in Chicago is located in two "highly concentrated" enclaves between which runs the Seventh Congressional District, an African-American majority district. *Id.* at 648-49.

The court determined that the two enclaves of Hispanic population did not indicate separate communities, but they "appear[ed] to have occurred as a result of exogenous physical and institutional barriers." *Hastert*, 777 F. Supp. at 649. These exogenous barriers include an expressway as well as "expanses of land developed by the University of Illinois-Chicago Circle and various other medical institutions" which cut through the two Hispanic enclaves. *Hastert*, 777 F. Supp. at 648-49. Furthermore, the two enclaves were approximately one mile apart at their closest point. *Id.*, *see also* D.I. App. at 1.

The *Hastert* court ruled that the Hispanic community is politically cohesive. *Hastert*, 777 F. Supp. at 650. Although the court did note that prior judicial decisions found that the Hispanic communit, was politically cohesive, the court did not base their conclusion solely on this fact.[5] The *Hastert*

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[5] King erroneously asserts that the *Hastert* court relied solely on prior judicial decisions to support its findings of past discrimination against Hispanics. J.S. at 23-25. King ignores the true relevant facts. On the issue of the *Gingles* preconditions, the *Hastert* court relied upon the evidence submitted at trial which consisted of ecological regression statistical data demonstrating white bloc voting and Hispanic

(continued...)

court had before it affidavits from members of the Hispanic community in Chicago and a sociologist describing actual shared interests among the Hispanic community in Chicago. *Hastert*, 777 F. Supp. at 649.

The court also reviewed statistical evidence of racial bloc voting patterns in Chicago and determined that "ethnic bloc voting patterns have thwarted the political interests of the Hispanic community." *Id.* at 650. Lastly, the court found that the history of past and present discrimination against the Hispanic community in Chicago had an attendant impact on effective political participation and representation. *Id.*

The *Hastert* court considered the shape of the district in determining whether Section 2 of the Voting Rights Act required as a remedial measure the creation of the Fourth Congressional District. The *Hastert* court remarked that because the proposed Hispanic district was an "extraordinary configuration," the court would not agree to the remedial measure without carefully scrutinizing the proposed district. *Hastert*, 777 F. Supp. at 648.

Ultimately, the *Hastert* court determined that the Fourth Congressional District's shape was necessary to counteract the effects of white bloc voting and was required to remedy the vote dilution of Hispanics in the affected area while also protecting the three African American majority districts against impermissible retrogression. *Id.* at 662.

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[5](...continued)
cohesion. *Hastert*, 777 F. Supp. at 650. In further support of this, the court noted a history of Hispanic vote dilution in Chicago as set out in prior judicial decisions. *Id.* And in the *King* trial, there was clear statistical evidence of vote dilution in the Hispanic community. *King*, J.S. App. at 63-64. Moreover, because King declined to put on any evidence below concerning the *Hastert* "totality of the circumstances" findings, he can argue no error on this point. *Id.* at 64-65.

C. The *King* Court's Decision.

On December 13-15, 1995 a three day trial was held on this matter. At trial, the parties presented evidence that had been previously admitted in the *Hastert* litigation. The parties put on witnesses that addressed the three *Gingles* preconditions, including statistical data on voting patterns in the City of Chicago up to and including elections in 1995. All parties were able to fully argue and brief their respective positions to the court. After trial, on March 15, 1996, the three-judge panel issued a written decision upholding the constitutionality of the Fourth Congressional District.

1. The *King* Court's Application of Strict Scrutiny to the *Hastert* Court's Plan.

In applying this Court's rulings in *Shaw* and *Miller*, the *King* court subjected the *Hastert* court's Fourth Congressional District to strict scrutiny. *King*, J.S. App. at 57. Recognizing that the case was in a unique posture since it was a challenge to the determination made by a three-judge panel in the *Hastert* case, on December 13, 1995 the *King* court determined that it would take judicial notice of the findings of fact of the *Hastert* court.[6] The court further ruled that the *Hastert* evidence was conditionally admitted at trial for purposes of showing what evidence was relied upon by the *Hastert* court. *King*, J.S. App. at 15. In deciding to take judicial notice of the *Hastert* findings, the *King* court stated that it would adopt those findings as conclusive unless King showed that the *Hastert* court erred, by law or otherwise, in making the specific findings or that changed circumstances existed since November 1991 such that the findings of the *Hastert* court were no longer valid. *King*, J.S. App. at 15-19.

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[6] Consistent with Seventh Circuit precedent, the lower court ruled that due to the unique nature of the case and the need to expedite matters for trial, judicial notice of the *Hastert* findings would be taken. *See, Philips Medical Sys. Int'l B.V. v. Bruetman*, 982 F.2d 211, 215 n.2 (7th Cir. 1992).

The *King* court ruled that plaintiff King must establish changed circumstances by a preponderance of the evidence. *King*, J.S. App. at 19. If changed circumstances were established, the *King* court would then analyze the evidence *de novo*. *Id*.

a. The *King* Court's Analysis of the *Hastert* Court's Section 2 Findings.

The *King* court determined that the *Hastert* court properly found that the Hispanic community was sufficiently large and geographically compact under the first prong of *Gingles* and that plaintiff King failed to rebut this finding by competent evidence. The court rejected plaintiff's argument that the Hispanic community in Chicago lacked political cohesion because it consists of Mexican-American and Puerto Rican residents. The only evidence plaintiff King submitted was anecdotal evidence which the *King* court found was "incredible, and wholly insufficient to support the inferences and conclusions King seeks to draw." *King*, J.S. App. at 62.

King argued at trial that changed circumstances existed with respect to the *Hastert* court's findings of racial bloc voting. The *King* court rejected this argument because it was not supported by the recent citywide elections or any meaningful statistical analysis. *King*, J.S. App. at 62-63. Instead the court credited Professor Allan Lichtman's ecological regression and extreme case analysis of forty-one elections held between 1983 and 1995. Professor Lichtman's analysis established a "definite and continuing pattern of white racial-bloc voting against Hispanic candidates." *King*, J.S. App. at 63-64.

Lastly, at trial King argued that the Fourth Congressional District was not sufficiently compact to create a remedial district. In support of this argument King offered evidence that the district has many sides and is not visually appealing. The court rejected this argument. The court found that the evidence from the *Hastert* case and the

evidence taken at trial in this case, confirmed that the Hispanic community in Chicago was geographically compact as required by *Gingles*. *King*, J.S. App. 59-62. In so holding, the *King* court found that the *Hastert* court's prior determination of geographic compactness was proper because King failed to establish present day circumstances which would indicate changed circumstance. *Id.* at 64.

The *King* court concluded its review of the *Hastert* Section 2 findings as follows:

> the *Hastert* court had a strong basis for finding a Section 2 violation and for adopting a redistricting plan that remedied that violation. In this regard, the *Hastert* court cited with approval prior judicial determinations that found a definite and continuing pattern and practice of electoral discrimination against the Hispanic community in the City of Chicago and the State of Illinois. The *Hastert* court further found that this historical discrimination against the Hispanic community was on-going, most visibly in the racial bloc voting that effectively limited the Hispanic community to a disproportionately small number of Hispanic elected officials at the city and state-levels and more subtly in the social and economic discrimination that adversely affected effective political participation and representation. Under these circumstances, the creation of an Hispanic majority district advanced the state's compelling interest of remedying past discrimination against Hispanics. *King*, J.S. App. at 66-67 (footnote omitted).

After finding that the *Hastert* court's adoption of the Fourth Congressional District was an appropriate remedy to

a finding of vote dilution under Section 2, the *King* court then addressed the issue of narrow tailoring.

D. The *Hastert* and *King* Court's Finding of Narrow Tailoring.

In *Hastert*, the court subjected the two proposed plans to an exacting constitutional review. *Hastert*, 777 F. Supp. 640-62. In so doing, the court noted that the Fourth Congressional District was narrowly tailored to include those Hispanics who suffer from vote dilute. *Hastert*, 777 F. Supp. at 650. Further, the court stated that the Fourth Congressional District contained the number of Hispanic residents that was minimally necessary to ensure a reasonable opportunity to exercise effective political participation. *Hastert*, 777 F. Supp. at 655. Moreover, the court determined that the shape of the district was required to preserve the shared interests of Hispanics while also protecting the three African American majority districts from impermissible retrogression. *Id.*

In determining which plan better served the remedial purpose of curing vote dilution, the *Hastert* court evaluated both plans for fairness to the voting rights of the African American and Hispanic racial/ethnic majorities. *Hastert*, 777 F. Supp. at 645. Because three African American majority districts already existed prior to the litigation, the *Hastert* court was concerned that any new remedial plan not result in "retrogression" of the ability of African Americans to choose a candidate of choice. *Id.* at 647. Further, because it had been established that a 65% majority of African Americans in a district was required to provide a meaningful opportunity to elect a candidate, (*See Ketchum v. Byrne*, 740 F.2d 1398, 1408 n.7 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985), the court reviewed the proposed plans in order to determine whether any remedial measure afforded the Hispanics would impermissibly dilute African American voting strength. *Hastert*, 777 F. Supp. 647-48.

The *Hastert* court adopted a remedial plan which accomplished both objectives in the least intrusive manner. The plan created a new Hispanic majority district with 65% total population and maintained three African American districts with at least 65% total population. The court also scrutinized the proposed remedial plans and determined that the plan that was subsequently adopted best served the interest of fairness to both Democrats and Republicans. *Hastert*, 777 F. Supp. at 655-59. In fact, the court noted that the creation of a Hispanic majority district and the maintenance of three African American majority districts had bipartisan support. *Id.* 646 n.19.

The *King* court found that the *Hastert* court had scrutinized the constitutionality of the Fourth Congressional District and had properly determined that the district was an appropriate remedy to cure a Section 2 violation. *King*, J.S. App. at 68-70. The *King* court did note that the adopted plan "includes virtually all areas of high Hispanic concentration on the northern ... part of the City of Chicago as well as virtually all of the areas of high Hispanic concentration on the southern part of the City of Chicago," (*King*, J.S. App. at 54 (internal citations omitted)), with the "western connector" making up only 4.7% of the total population of the district and 3.1% of the district's Hispanic population. *King*, J.S. App. at 59 n.49. The court concluded that the plan was "properly proportioned to the nature of the violation" and was "narrowly tailored." *King*, J.S. App. at 70.

ARGUMENT

This Court has recently held that the application of strict scrutiny does not mean "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S. Ct. 2097, 2117 (1995) (citation omitted). Indeed, this Court has recognized that "[t]he unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and

government is not disqualified from acting in response to it." *Id.*; *see also id.* at 2135-2136 (Ginsburg, J., dissenting).

Here, it was the federal court, and not the government who acted in response to racial discrimination. In an effort to remedy proven past and present racial discrimination in the voting rights context against Hispanics in Chicago and to avoid a strong Section 2 challenge of retrogression in the African American districts, the lower court in this case allowed a 1991 court-ordered remedial plan to stand against a constitutional challenge. The 1991 court-ordered remedial plan created, for the very first time, a fair opportunity for Hispanics to elect a congressman of their choice. In following this Court's precedent, the *King* court determined upon a thorough review of all the evidence that the application of strict scrutiny to the 1991 remedial plan was indeed not "fatal in fact." *Adarand,* 115 S. Ct. 2117.

I. IN APPLYING STRICT SCRUTINY TO THE CHALLENGED PLAN, THE DISTRICT COURT PROPERLY DEFERRED TO THE *HASTERT* COURT FINDINGS SUBJECT TO KING DEMONSTRATING ERROR OR CHANGED CIRCUMSTANCES.

King erroneously claims that he was denied the opportunity to prove his case. J.S. at 6. Because the procedural facts of this case are quite unique, and in an effort towards judicial economy, the *King* court correctly conditionally admitted the *Hastert* court findings under Federal Rule of Evidence 201.

King asserts at length that the district court erred in treating this case under Federal Rule of Civil Procedure 60(b) because the doctrines of "collateral attack" and "*res judicata*" did not apply to King since he was not a party to the *Hastert* litigation. J.S. at 6-10. This is a non-issue. It is undisputed that King was not a party or in privity to the *Hastert* litigation. However, because the essence of King's lawsuit was essentially an attack on the remedial plan

adopted by the *Hastert* court, the lower court appropriately applied a modified version of the Rule 60(b) standard. *King*, J.S. App. at 17. The lower court held that it would admit into evidence the findings of fact of the *Hastert* court and would adopt those findings unless King demonstrated (1) that the findings were "clearly erroneous"; or (2) that specific factual circumstances had changed. *King*, J.S. App. at 18-19.[7]

The lower court's conditional admittance of the *Hastert* court's findings was proper. As the lower court noted, had King been a party or in privity to the *Hastert* litigation, Rule 60(b) would have applied and the findings of fact established by the *Hastert* court would have been admitted as the "law of the case." *See, Bennett v. Arrington*, 806 F. Supp. 926, 927 n.2 (N.D. Ala. 1992), *aff'd in part, rev'd in part on other grounds*, 20 F.3d 1525 (11th Cir. 1994). However, the *King* court only conditionally admitted the findings of the *Hastert* court. King was given a full opportunity at trial to show that the *Hastert* findings were in error or were no longer valid.

In support of his claim of error, King cites to the case of *Martin v. Wilks*, 490 U.S. 755 (1989). Rather than supporting King's position, the subsequent history of the *Wilks* case affirms the decision made by the *King* court.

In *Wilks*, this Court allowed white firemen to assert an equal protection challenge to a 1981 consent decree concerning minority hiring goals even though they were not a party to the original lawsuit which resulted in the consent decree. *Id.* The original lawsuit which resulted in the consent decree arose out of a claim of reverse discrimination by the three white firemen, but was subsequently reversed by the Eleventh Circuit. *See, In re: Birmingham Reverse*

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[7] Although King now claims that the lower court erred in conditionally admitting the *Hastert* findings, King has nonetheless availed himself of this ruling by relying upon many of the findings of fact established by the *Hastert* court to support his claims of error. *See,* J.S. at 12, 16-18.

Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987), *aff'd, Martin v. Wilks*, 490 U.S. 755, 109 S. Ct. 2180 (1989). Following this Court's decision in *Wilks*, the district court held a second trial to address the reverse discrimination claims. *Bennett v. Arrington*, 806 F. Supp. 926, 927 n.2 (N.D. Ala. 1992), *aff'd in part, rev'd in part on other grounds*, 20 F.3d 1525 (11th Cir. 1994). At this second trial, the district court admitted into the record the evidence admitted and relied upon by the original *In re: Birmingham Reverse Discrimination Employment Litigation* trial court. *Bennett*, 806 F. Supp. at 927. Likewise, the *King* court admitted into the trial record the original facts relied upon by the *Hastert* court and gave King an opportunity to demonstrate that those facts were clearly erroneous or that changed circumstances existed which would lead to a different factual conclusion.

King was given a full opportunity to prove his case. He had three trial days to show that the *Hastert* findings were wrong or that changed circumstances existed. At trial all parties addressed the issues of the *Gingles* preconditions, communities of interest, and traditional redistricting principles. King was not precluded from proving his case in any manner. Rather, he was unable to put forth competent evidence to support his claim. This does not raise a valid issue for review by this Court.

II. THE DISTRICT COURT CORRECTLY FOUND THAT CREATION OF A MAJORITY HISPANIC DISTRICT WAS REQUIRED TO SERVE THE COMPELLING GOVERNMENTAL INTEREST OF COMPLYING WITH SECTION 2 OF THE VOTING RIGHTS ACT.

There is a compelling governmental interest in complying with Section 2 of the Voting Rights Act so as to assure that a state's redistricting plan does not dilute minority voting strength. *Bush v. Vera*, __ U.S. __,116 S. Ct. 1941, 1968-69 (1996) (O'Connor, J., concurring); *id.* at 1975, 1989 (Stevens, J., joined by Ginsburg and Breyer, JJ.,

dissenting); *id.* at 1998, 2007 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). As Justice O'Connor observed in *Bush,* 116 S. Ct. at 1969-1970:

> [W]here voting is racially polarized, §2 prohibits States from adopting districting schemes that would have the effect that minority voters "have less opportunity than other members of the electorate to . . . elect representatives of their choice." §2(b). That principle may require a State to create a majority-minority district where the three *Gingles* factors are present -- viz., (i) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district," (ii) "it is politically cohesive," and (iii) "the white majority votes sutficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. at 50-51.

The three-judge court in this case concluded that all three of the *Gingles* factors are present in this case, and that a majority Hispanic district was necessary to comply with Section 2. Those findings are supported by substantial evidence, are not clearly erroneous, and present no issue warranting further review by this Court.

First, both the *Hastert* Court in 1991, and the court below in 1996, found that the Hispanic population of Chicago was sufficiently large and geographically compact to constitute a majority in a single-member district. *Hastert*, 777 F. Supp. at 649; *King*, J.S. App. at 64. As both courts acknowledge, the Hispanic population in Chicago had grown to 545,852 by 1990; most of this population is clustered in two dense enclaves that are approximately a mile apart at their closest point; and this small separation does not reflect the existence of two distinct communities, but merely the presence of a highway and institutional campuses that lie between the two enclaves. *King*, J.S. App. at 28, citing *Hastert*, 777 F. Supp. at 649.

King argues that the Hispanic population is insufficiently compact under *Gingles* because the Fourth Congressional District is not itself compact. J.S. at 29. Even assuming that the "western connector" of the Fourth Congressional District indeed renders the district noncompact — an incorrect assumption, as demonstrated below — King's argument is nevertheless in error. "The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district." *Bush*, 116 S. Ct. at 1971 (Kennedy, J., concurring); *see also id.* at 1970 (O'Connor, J., concurring) (noting that, despite noncompactness of challenged District 30 in Dallas County, other potential district configurations showed requisite geographical compactness of minority population).[8] Thus, because the Hispanic population itself is geographically compact, the requisite showing under the first prong of *Gingles* is not defeated merely because the challenged district departs to some extent -- here, to a very small extent -- from the configuration that would *maximize* the district's compactness.

King further argues that a finding under the first prong of *Gingles* is barred as a matter of law absent proof that Hispanics constitute more than 50% of the citizen voting-age population (CVAP) of the challenged district. This argument presents no significant issue for review. Hispanics make up 65% of the district's total population and 59% of its voting-age population, and the district actually elected an Hispanic candidate in both 1992 and 1994. The purpose of the first prong of the *Gingles* requirement is to determine whether "minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice," *Gingles*, 478 U.S. at 50 n.17 (emphasis in original), and that potential clearly has been realized by District 4. *Cf.*

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[8] As several maps in the record indicate, a hypothetical majority-Hispanic district can be drawn using regular and reasonably compact shapes, including through the use of a "middle connector." *See* D.I. App. at 2-3.

Bush v. Vera, 116 S. Ct. at 1970 (noting that proof satisfied *Gingles* factors in Dallas County, Texas where reasonably compact plans with 44% or 45.6% African American populations could be drawn).

Further, even assuming that a district with less than a 50% Hispanic CVAP could never satisfy the first prong of the *Gingles* requirement,[9] King's assertion that Hispanics make up 45% of the CVAP in District 4 is only an estimate. The district court properly declined to adopt this estimate as definitive because it reflected several flaws and omissions, most of which King ignores in his jurisdictional statement.[10]

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[9] For numerous reasons, it would be improper to require proof of a majority-Hispanic CVAP before a majority-Hispanic district could be drawn. For one thing, the Census Bureau does not release citizenship estimates when it releases the results of the census enumeration, and such information is simply unavailable at the time when states must conduct decennial redistricting early in the decade. *See also Wilson v. Eu*, 1 Cal. 4th 732, 750-51 (1992) (rejecting requirement of CVAP majority as basis for assessing the first prong of *Gingles*); *LULAC v. North East Independent School District*, 903 F. Supp. 1071, 1083-84 (W.D. Tex. 1995) (same). Further, the data the Census releases for redistricting purposes is from a full-count enumeration while the citizenship data derives from a sample count of the population. *King*, J.S. App. at 61 n.58. This sample-count citizenship data is released at the block-group level while the full-count data is released at the smaller, and more precise, block level. *Id.* Consequently, the citizenship sample-count data is subject to sampling error. *King*, J.S. App. at 61 n.58. However, the issue need not be resolved here, because there is no substantial factual dispute that Hispanic residents are sufficiently numerous to elect a candidate of choice in Fourth Congressional District.

[10] King's estimate was flawed in part because it failed properly to account for split Census group blocks; because the Census data involved is not based on an enumeration, but

(continued...)

The jurisdictional statement also does not identify any specific error in the district court's findings that Hispanics are politically cohesive (*Gingles* prong 2), and that whites vote sufficiently as a bloc usually to defeat Hispanic candidates except in districts where Hispanics comprise a majority of the population (*Gingles* prong 3), stating only that appellant "does not concede" the presence of racial bloc voting. J.S. at 25. However, substantial evidence supports the district court's conclusion of legally significant racially polarized voting in Chicago. The *King* court credited Dr. Allan Lichtman's ecological regression and extreme case analysis of forty-one elections held between 1983 and 1995. *King*, J.S. App. at 63. The evidence showed that Hispanics in Chicago consistently support Hispanic candidates and that the statistical results "establish a definite and continuing pattern of white racial-bloc voting against Hispanic candidates." *King*, J.S. App. at 63. As a result of this bloc voting, no Hispanic candidate has ever been elected to Congress, the state legislature, or the Chicago City Council except from majority-Hispanic VAP districts, and only one Hispanic candidate has ever won a citywide election. This evidence and other substantial evidence fully supported the district court's findings that the second and third *Gingles* factors were present. *Cf. Bush v. Vera*, 116 S. Ct. at 1970

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[10](...continued)
instead on sampling techniques that are subject to sample errors; and because it did not overcome defendant-intervenors' evidence that naturalization and an INS amnesty program had increased the number of Hispanic citizens in the district. J.S. App. at 61 n.58. Further, it is immaterial that the district court in one passage may have characterized plaintiff's 45% estimate as an estimate of the percentage of adult Hispanics who were citizens, rather than the percentage of the adult citizen Hispanics in the district. The court correctly recognized that there was simply no "competent evidence that the Hispanic citizen voting age population falls below fifty percent." J.S. App. 61.

(O'Connor, J., concurring) (noting that racially polarized voting in Dallas County was properly demonstrated by similar evidence).

Ignoring the findings made on each of the three *Gingles* factors, appellant argues that the judgment below is in error because the district court "never reviewed whether a [Section 2] violation existed." J.S. at 21. This argument is without basis. The court carefully reviewed the record evidence on each of the three *Gingles* factors, considering not only the evidence before the *Hastert* court but additional evidence put on by the parties at the 1995 trial, and found that the evidence demonstrated the existence of each factor. *King*, J.S. App. at 58-65; *id.* at 68 ("The *Hastert* court adopted the Fourth Congressional District to remedy a proven Section 2 violation. The injuries resulting from the dilution of the Hispanic voting power were clear and present").[11] These are precisely the findings contemplated under this Court's decisions as a predicate for drawing a majority-minority district. *Bush v. Vera*, 116 S. Ct. at 1961 (noting that the three *Gingles* factors are "the threshold conditions for § 2 liability" that must be assessed under the strict scrutiny test) (plurality opinion) (citations omitted); *id.* at 1970 (O'Connor, J., concurring).

Plaintiff's citation of *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993), as imposing a more onerous burden for court-ordered majority-minority districts, is inapposite. In *Voinovich*, the federal court had improperly struck down a legislative redistricting plan crafted by the Ohio legislature, without proper proof of a Section 2 violation. Here, the federal court's role in crafting the 1991 redistricting plan was different because the Illinois legislature had failed to enact

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[11] As the court below noted, the *Hastert* record included findings on additional factors supportive of a Section 2 claim under the totality of circumstances, and plaintiff declined, during the proceedings below, to put on further evidence concerning such factors. *King*, J.S. App. at 64-65.

any redistricting plan and the *Hastert* court therefore was *required* to assume that "unwelcome obligation." *Connor v. Finch*, 431 U.S. 407, 415 (1977). Under such circumstances, as both the *Hastert* court and the court below properly recognized, it was entirely proper for the *Hastert* court to create a majority-Hispanic district to avoid unlawful dilution of Hispanic voting strength under Section 2 of the Voting Rights Act.

III. THE *HASTERT* COURT'S REMEDIAL PLAN IS NARROWLY TAILORED TO SERVE THE COMPELLING STATE INTEREST OF COMPLYING WITH THE VOTING RIGHTS ACT.

This Court has held that a district survives strict scrutiny if there is a "strong basis in evidence" to show that a majority-minority district is reasonably necessary to comply with Section 2 and that it "substantially addresses the § 2 violation." *Bush v. Vera*, 116 S. Ct. 1941, 1960 (1996) (plurality opinion) (internal citations omitted). Further, this Court has rejected as "impossibly stringent" the view that "a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria." *Id.* (internal citations omitted). The record below fully supports the lower court's findings that the Fourth Congressional District is narrowly tailored and meets strict scrutiny.

In creating this remedial district, the *Hastert* court narrowly tailored the district to included the specific geographically compact Hispanic population found to be discriminated upon through vote dilution. Moreover, the portion of the district that gives it a noncompact visual appearance, the "western connector," contains only 4.7% of the overall population of the Fourth Congressional District. This means that all but a small fraction of the population resides within the compact area that essentially coincides with a "hypothetical court-drawn district," (*Bush*, 116 S. Ct. at 1970)(O'Connor, J., concurring)), that satisfies the first

prong of *Gingles*. *Compare Shaw v. Hunt (Shaw II)*, __ U.S. __, 116 S. Ct. 1894, 1907 (1996) (only 20% of the challenged district coincided with the area where blacks were alleged to be geographically concentrated). Because this Court has determined that a remedial district does not have to achieve the maximum possible compactness, the very small percentage of population within the allegedly non-compact "western connector" supports the district court's conclusion that the Fourth Congressional District is narrowly tailored to address the Section 2 violation.[12]

A. The Fourth Congressional District Does Not Disregard Illinois' Traditional Redistricting Principles.

The Fourth Congressional District does not reflect a "substantial disregard" for Illinois' redistricting principles. *Miller*, 115 S. Ct. at 2497 (O'Connor. J., concurring). King asserts that political subdivisions were split in the crafting of the Fourth Congressional District in violation of Illinois' traditional redistricting standards. J.S. at 15. The evidence at trial did not support this assertion. The lower court found that the evidence submitted on this point showed that political lines in the Fourth Congressional District were split at an equal, if not at a lower rate as compared to non-minority populated districts. *King*, J.S. App. at 55. Furthermore, King's own expert Christopher Cleveland conceded that the primary reason why the Fourth

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[12] When only 4.7% of the population of a district lies within the area that gives rise to a noncompact visual appearance, such a *de minimis* impact should not invalidate the district. *Cf. White v. Regester*, 412 U.S. 755, 764 (1973) (maximum total deviation of 9.9% from ideal district population held insufficient to make out a *prima facie* case of one-person, one-vote violation under Fourteenth Amendment); *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973) (maximum total population deviation of 8% insufficient to make out a *prima facie* case under Fourteenth Amendment).

Congressional District appeared to have split townships and counties at a greater rate than other districts was because of the "western connector." D.I. App. at 6. Thus, the vast majority of the Fourth Congressional District (95% of the district) did not split townships or counties.

Moreover, the court found that King's argument that the traditional redistricting principle of respect for political subdivisions was ignored was not supported by the evidence. The court stated that "[t]he data permits the uncertain conclusion that compared to other Illinois congressional districts, the map of the Fourth Congressional District did not excessively split political subdivisions." *Id.*[13] King does not dispute the evidence in the record that other congressional districts split a comparable or greater number of political subdivisions as does the Fourth Congressional District.

Further support for this lies in the 1982 Illinois state legislative redistricting case where a three-judge federal panel minimized its reliance on political boundaries for redistricting in Illinois and stated that it would not strike down the challenged plan "merely because it fractures a number of political subdivision lines or creates districts that overlap between Chicago and its surrounding suburbs." *Rybicki v. State Board of Elections*, 574 F. Supp. 1082, 1099 (N.D. Ill. 1982) (three-judge court). And it is clear that respect for political subdivisions does not correspond to respect for communities of interest in Illinois. As the Illinois Supreme Court has stated "boundary lines of villages, townships,

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[13] King argues that election precincts were unduly split in the configuration of the Fourth Congressional District. J.S. at 15. This argument is without merit. Illinois law provides that all precinct boundaries will be reconfigured following the completion of congressional reapportionment. *10 ILCS 5/11-3*, J.S. App. at 77-78. Thus, in Illinois the boundaries of the congressional districts determine the boundaries of the precinct lines.

counties and cities do not necessarily reveal communities of interests." *People of the State of Illinois ex rel. Burris v. Ryan*, 147 Ill.2d 270, 282 (Ill. 1991) (Heiple, concurring), *aff'd after remand*, 147 Ill.2d 270 (1992), *cert. denied*, 504 U.S. 973 (1992).

B. The Shape of the Fourth Congressional District is Reasonably Compact to Remedy a Finding of Vote Dilution.

The Fourth Congressional District is comprised predominately of two densely Hispanic populated neighborhoods which are geographically close to each other. The district is only 14 miles wide from its western most point to its eastern most point. D.I. App. at 1. It is only 16 miles long, from north to south. *Id.* All of the district is within Cook County (D.I. App. at 6), and a vast majority of the district is within the City of Chicago. D.I. App. at 6.[14]

Also, the Fourth Congressional District is located in one media market. D.I. App. at 5. The record below established that the current congressman for this district is able to communicate and effectively represent the residents within all of the district with no difficulty. D.I. App. at 4.

Further, the Fourth Congressional District is substantially different from the districts struck down by this

---

[14] As evidence of the compactness of the Latino community, the lower court noted that a relatively small triangle could be drawn around the two dense Latino populated enclaves on the northern and southern portions of the district. Although the lower court found that the western connector or the northern most or southern most points would not fit within this small triangle, the court apparently recognized the *de minimis* nature of these outer-triangle areas in holding that "[t]he finding of geographic compactness [under Section 2] thus does correspond to a separate finding that the Fourth Congressional District was also compact." *King*, J.S. App. at 52 n.48.

Court. In *Miller,* this Court determined that the Eleventh Congressional District connected black population of metropolitan Atlanta with rural black population of coastal Chatham County, which were 260 miles apart. This Court further noted that the social and economic characteristics of the two areas were different. *Miller*, 115 S. Ct. at 2484. Here, the record establishes that the Fourth Congressional District is relatively small in size and dense in concentration. And, unlike the district in *Miller*, it also seeks to connect population areas which share common socio-economic characteristics. *King*, J.S. App. at 56.

The facts of this case are also inapposite to the facts of *Shaw II.* In *Shaw II* the district at issue was found by this Court not to be narrowly tailored because it was not "geographically compact" under the first prong of *Gingles*, and the district was not located in the geographic area where the alleged violation of Section 2 was to have occurred. *Shaw II*, 116 S. Ct. at 1906. Because of these facts, this Court found that the district was not necessary since the *Gingles* preconditions were not met and the district was not narrowly tailored. Here, the lower court correctly found that the geographically compact Hispanic population that suffers from vote dilution would form the basis for the configuration of the reasonably compact Fourth Congressional District. Unlike the facts in *Shaw II*, the Fourth Congressional District is narrowly tailored.

In addition, to the extent that the district is not visually compact due to the "western connector," this is a result of an effort to avoid clear retrogression in the African American majority districts. The *Hastert* court specifically found that the Fourth Congressional District's shape was dictated by the need to preserve the three existing African American districts which, the court held, was required under the Voting Rights Act. *Hastert*, 777 F. Supp. at 650. As the *King* court noted, in order to ensure that the three pre-existing African American districts had sufficient population to create effective and constitutional (one-person, one-vote) districts,

the shape of the African American districts necessarily affected the boundaries of the Fourth Congressional District and resulted in the "western connector." *King*, J.S. App. 50-51.

Under the 1980's congressional plan, the three African American districts had black majorities well over 65% total population. *Hastert*, 777 F. Supp. at 646 n.19. After *Hastert*, those majorities were substantially reduced to just around 65% total population even with the use of the "western connector." Thus, avoiding non-retrogression and a violation of Section 2 with respect to African Americans was a real and substantial justification for the use of the "western connector" and the resultant minor departure from total compactness. The court adopted a plan that preserved the voting rights of both the Hispanic and African American affected population, at no expense to white voting strength.

King's additional argument concerning the alleged failure to consider alternative remedies does not present a valid issue for review. J.S. at 16.[15] The district court determined that the Fourth Congressional District was a necessary remedy that reflects a balancing process "left, within the appropriate constitutional or statutory limits, 'to the sound discretion of the trial court'." *United States v. Paradise*, 480 U.S. 149, 183-85 (1987)(internal citations omitted).

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[15] King further asserts that the Fourth Congressional District is not narrowly tailored because its shape is attributable to race and that traditional districting principles were subjugated in the drafting of the plan. J.S. at 13, 15. This argument is equally unpersuasive. In supporting his argument, King misstates the record. Contrary to King's assertion, the *King* court specifically noted that "geographic compactness" of the Hispanic residents does correspond to a separate finding that the Fourth Congressional District is also compact. *King*, J.S. App. at 52 n.48.

The record is clear that the lower court did address the issue of alternative remedies and found that the *Hastert* court properly tailored the remedy in this case.[16] The evidence below establishes that the Fourth Congressional District is a remedial plan that was specifically designed to cure proven vote dilution while not retrogressing the voting rights of the African American population. The *Hastert* court adopted a remedial plan which accomplished both objectives in the least intrusive manner. Both the Fourth Congressional District and the African-American majority Seventh Congressional District comprise only 65% minority population, the least amount of population necessary for effective minority districts in Chicago. King does not assert that the lower court's findings on the issue of potential retrogression in the African American districts are in error and the evidence below fully supports the lower court's findings.

C. The Fourth Congressional District Respects Communities of Interest.

The evidence below illustrates that the Fourth Congressional District contains a community with actual shared social and economic interests. *King*, J.S. App. at 62 n.59. A noted ethnographer and sociologist, Dr. Felix Padilla, testified about the economic and social cohesiveness of the Hispanic residents of the Fourth Congressional District. These commonalities included a common history of

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[16] King argues that other proposals submitted to the *Hastert* court should have been evaluated by the *King* court as alternative remedies. J.S. at 18-17. What should be noted is that each of the proposals King alludes to creates a majority Latino congressional district. The distinction among the plans concerns the placement of a "connector." Because the *Hastert* court's Fourth Congressional District best served the purposes of remedying dilution of Latino voting strength while also maintaining the three-existing African American districts from impermissible retrogression, the remedy was narrowly tailored and no race-neutral alternatives existed.

combatting social and political concerns as a unified group. *King*, J.S. App. at 62 n.59. Also, during the trial on the 1991 *Hastert* litigation, persons who were involved in developing the Fourth Congressional District as a proposed plan offered evidence to the *Hastert* court which demonstrated that the Hispanic population within the Fourth Congressional District had common social and economic concerns. *King*, J.S. App. at 62 n.59.

Further evidence was brought out at trial in this case which showed that while Latinos in the Fourth Congressional District area shared common socio-economic concerns, the white, African American and Hispanic populations in Chicago have substantially different socio-economic characteristics in areas of home ownership, income levels, unemployment, education and poverty levels. *King*, J.S. App. at 56. Importantly, the *King* court noted that the testimony of Dr. D. Garth Taylor demonstrated that the socio-economic characteristics of the Fourth Congressional District contrasted greatly with the socio-economic characteristics of the surrounding African American congressional districts. *Id*. Thus, rather than disregarding communities of interest, the *Hastert* remedial plan respects communities of interest. This also provide substantial justification of the creation of the Fourth Congressional District.

The *Hastert* court determined that the Hispanic community was geographically compact, politically cohesive and unable to elect candidates of their choice due to white bloc voting. *Hastert*, 777 F. Supp. 649-51. Furthermore, the court crafted a remedy which included the very same population experiencing vote dilution and limited the district to the minimum number of Hispanic residents generally believed necessary to provide an opportunity to elect a candidate of choice. *King*, J.S. App. at 70. As this Court has stated "[a] Section 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat

rival compact districts designed by plaintiffs' experts in endless 'beauty contests'." *Bush v. Vera*, 116 S. Ct. at 1960.

The *Hastert* court carefully scrutinized the proposals before it, considered the extent of the proven discrimination and the potential for impermissible retrogression, and adopted a plan which provided for the minimum amount of Hispanic population necessary to remedy vote dilution. Without the Fourth Congressional District, the Hispanic population that was found to have suffered from vote dilution would be substantially underrepresented in the political structure.

The *Hastert* court did not create more majority districts than was necessary to effectuate a remedial measure. As of 1990, Hispanics in Chicago comprise approximately 20% of the total population and 17% of the voting age population. The *Hastert* court created one district where Hispanics comprise approximately 65% of the total population and 59% of the voting age population — a district which has elected the first Hispanic congressman in the entire Midwest. The Fourth Congressional District is an appropriate remedy to address proven vote dilution. The record in this case clearly supports the lower court's findings that the Fourth Congressional District meets strict scrutiny.

CONCLUSION

King's arguments are completely without merit to warrant any further review from this Court. For the reasons noted above, this Court should grant Defendant-Intervenors' Motion to Affirm.

Dated: September 20, 1996

Respectfully submitted,

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No. 96-146

In The

Supreme Court of the United States

October Term, 1995

JAMES R. KING,

Appellant,

v.

STATE BOARD OF ELECTIONS, *et al.*,

Appellees,

BOBBY RUSH, TIMUEL BLACK, AL JOHNSON, ELVIRA CARRIZALES, NEOMI HERNANDEZ AND THE CHICAGO URBAN LEAGUE,

Defendant-Intervenors.

On Appeal From The United States District Court For The Northern District Of Illinois

APPENDIX TO DEFENDANT-INTERVENORS' MOTION TO AFFIRM

APPENDIX

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MAP OF THE 4TH CONGRESSIONAL DISTRICT SHOWING DISTANCES IN MILES.....App. 1

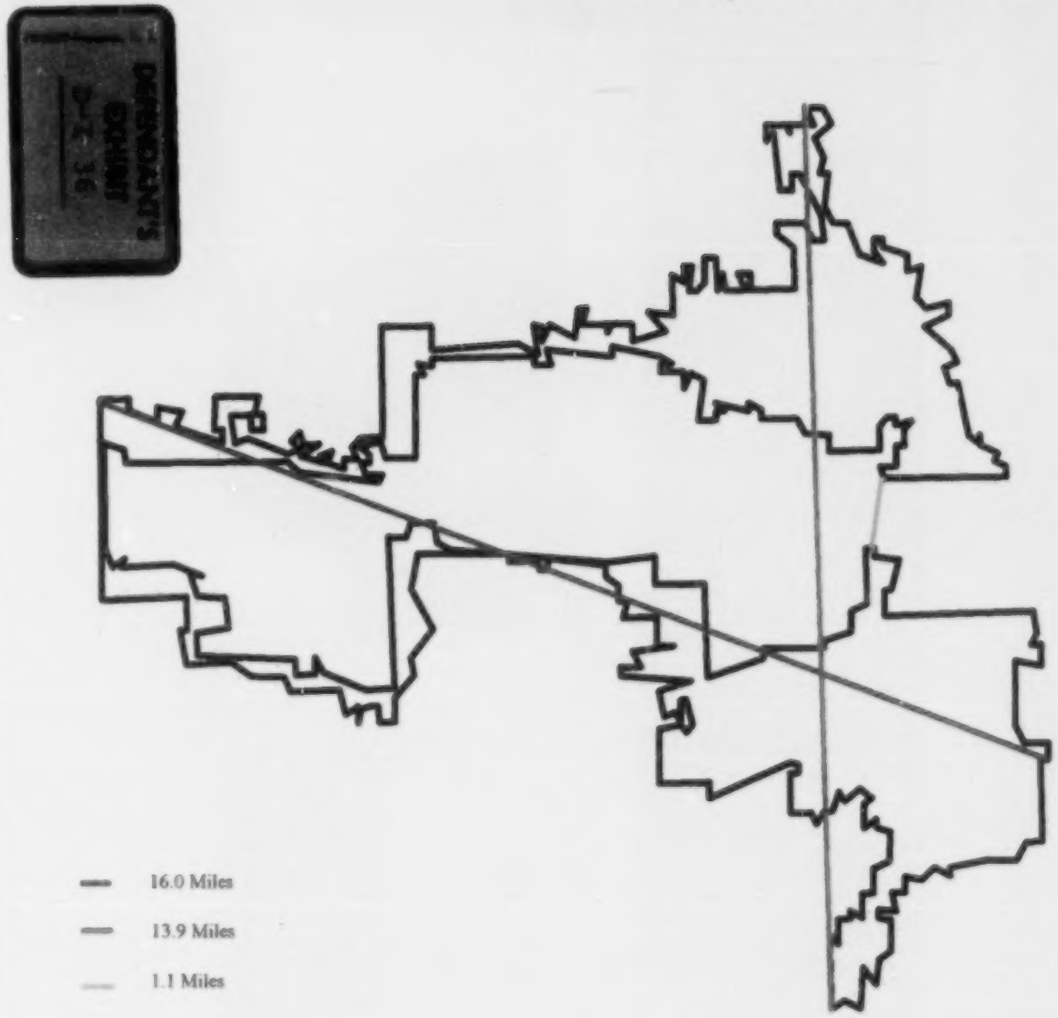
MAP OF THE ILLINOIS LATINO COMMITTEE FOR FAIR REDISTRICTING SHOWING THE 4TH CONGRESSIONAL DISTRICT WITH A MIDDLE CONNECTOR.....App. 2

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EXCERPT TESTIMONY FROM DIRECT EXAMINATION OF CONGRESSMAN LUIS GUTIERREZ.....App. 4

EXCERPT OF TESTIMONY FROM CROSS EXAMINATION OF CHRISTOPHER CLEVELAND...App. 6

4th Congressional District



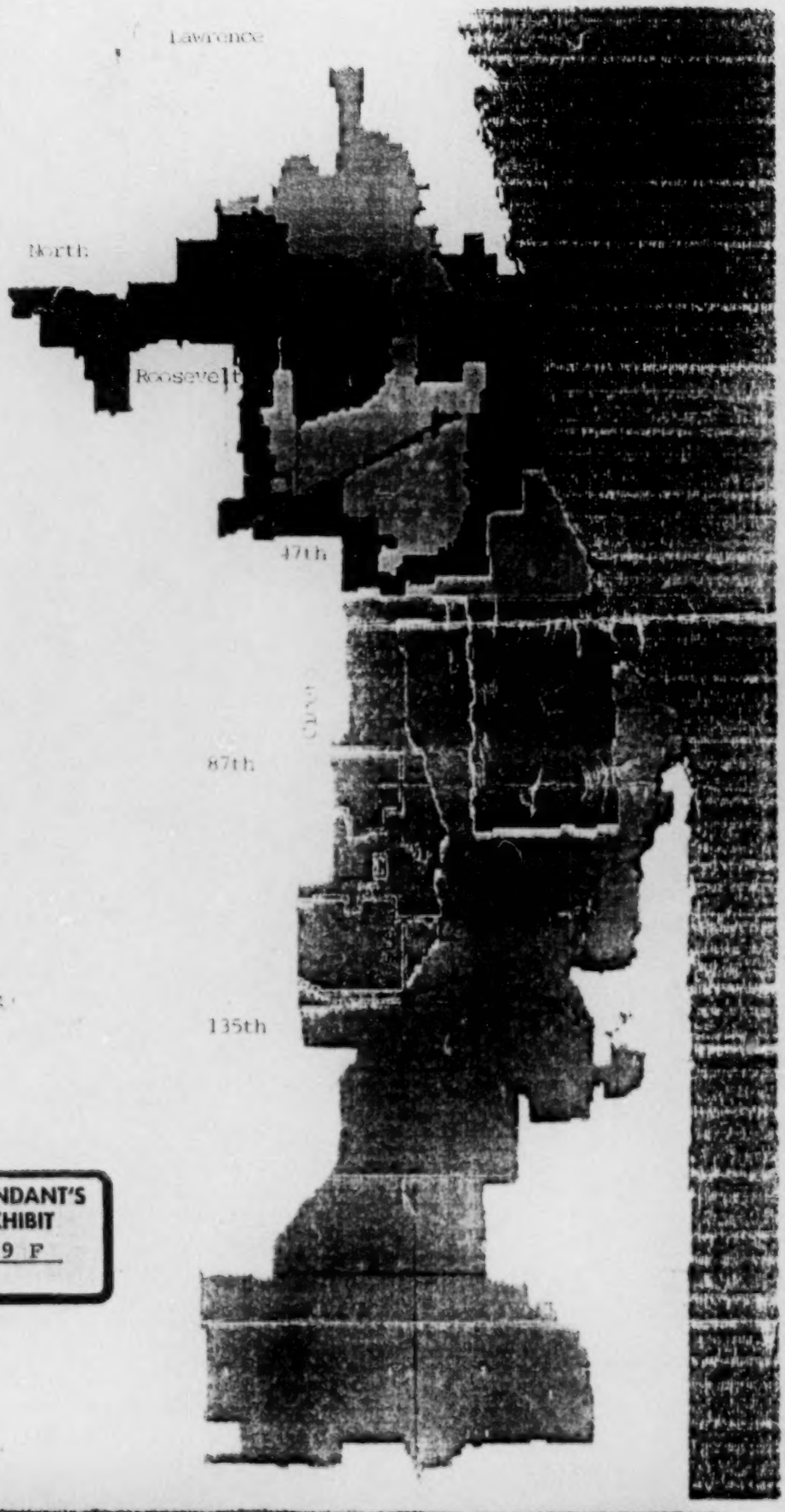
4th Congressional District

Miles
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Metro Chicago Information Center

Source: U. S. Department of the Census

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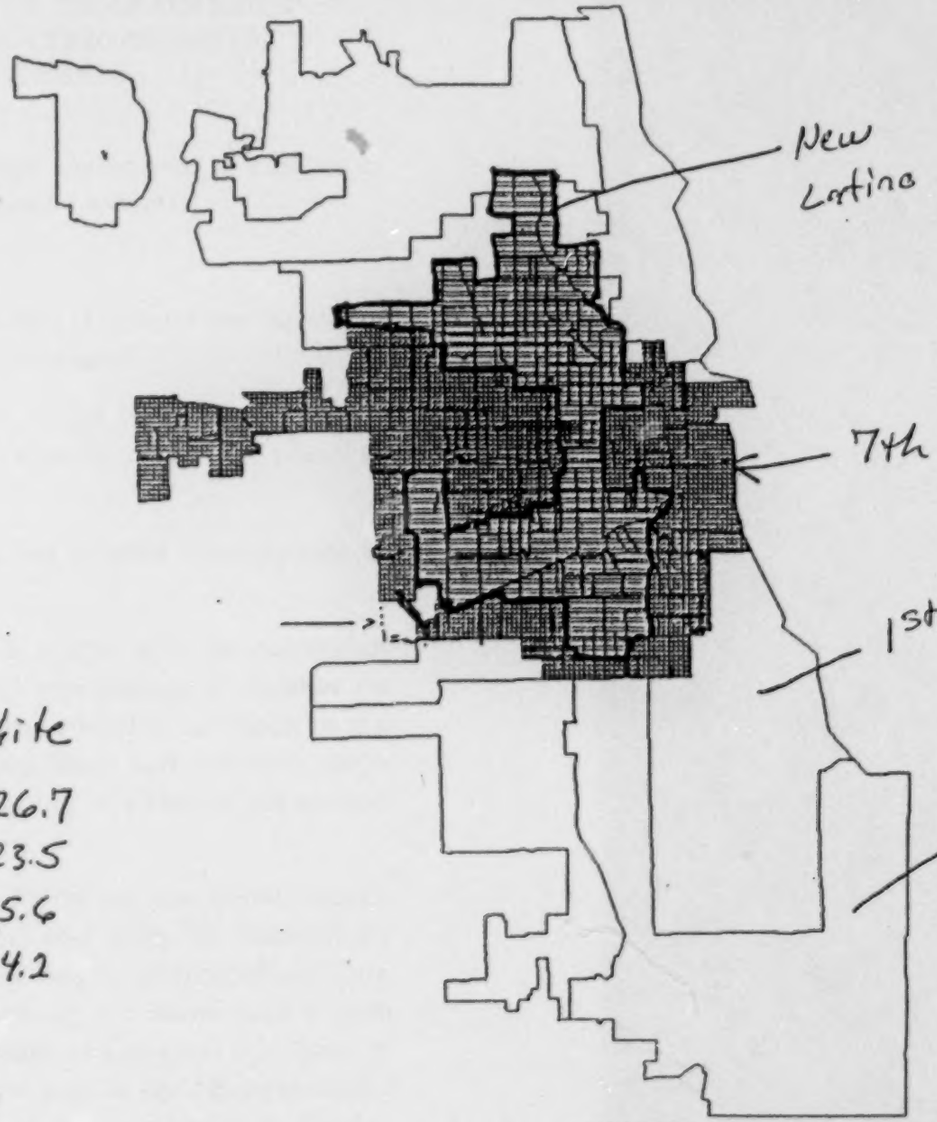
DEFENDANT'S EXHIBIT
29 F

DISTRICT	98	98	98	98	98
571530	TOT POP	HSP POP %	NHW POP %	BLK POP %	HSP VAP %
=1	571529	6,336	25,644	65,478	5,768
=6	571524	63,059	26,732	7,204	57,979
0	571530	6,604	25,181	67,862	5,931
>571530	0	0,000	0,000	0,000	0,000
<6	571524	4,697	25,931	68,650	4,085

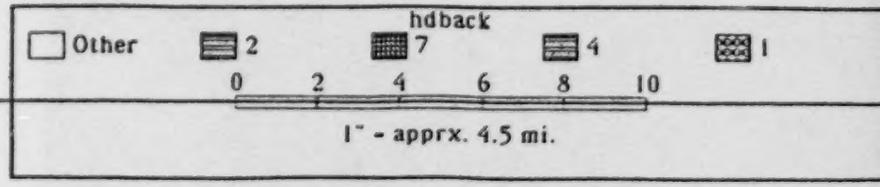
App. 3

MNVREP/MALDEF MINORITY CONGRESSIONAL DISTRICTS, JUNE 6 91

DEFENDANT'S EXHIBIT 29 G



	Black	Hisp	White
New	7.8%	62.6	26.7
1	69.2	6.2	23.5
2	65.6	8.0	25.6
7	65.2	7.6	24.2



EXCERPT TESTIMONY FROM DISTRICT EXAMINATION OF CONGRESSMAN LUIS GUTIERREZ

* * *

[p. 537] Q And does that enable you to effectively represent the 4th Congressional District?

A I believe it has.

Q Is it difficult for you to get around the district to communicate with your constituents?

A Takes me 20 minutes to get from just about any point in the congressional district from one point to another.

Q Now, have you had any trouble campaigning in the district?

A Absolutely not. It's – it's easy to campaign because it's easy to get from one church to another on Sundays, and almost all of the churches are open to me for campaigning, and the bus stops and the train stops and typical kinds of campaigning. It's easy to get around the congressional district.

I mean if you hold an activity on, you know, Damen and 47th Street and the next one is up on Western by Addison, you might get – and they're within half an hour. But it's very simple. I know of – I know that I have members and colleagues of mine in Congress who have to spend hours getting from one part of their congressional district to another part of their congressional district.

Q Is the 4th Congressional District in one media market?

A Yes, one media market, the Chicago media market.

Q And that includes both the English and Spanish media market?

[p. 538] A Both the English and Spanish media market, which has been borne out by our citizenship campaign.

* * *

Q Now, an area that's part of the 4th Congressional District is the Stone Park area; is that right?

* * *

A Yes.

Q And do you service that area?

A Yes. I was there last Saturday and I have been there probably not as frequently as I should be. I visited that area four times at least since I become elected a member of Congress.

Q And do the residents of Stone Park in your view share the common concerns of the residents of the rest of the 4th Congressional District?

A Yes, they do.

Q And is it difficult for you to get to Stone Park?

A Straight down North Avenue or the Eisenhower Expressway, whichever suits you better, to Mannheim.

* * *

EXCERPT OF TESTIMONY FROM CROSS EXAMINATION OF CHRISTOPHER CLEVELAND

* * *

[p. 240] Q. And starting with counties, this district, of course, is all in Cook County, correct?

A. That's correct.

* * *

[p. 253] Q And the political subdivisions that are split, the townships and places, that is specifically because of the western connector, correct, the places and the townships?

A Yes, limited to those two categories of split political subdivisions, yes. The townships and the counties were split primarily because of the western connector.

That's also largely because the district is primarily within the city of Chicago. The way the boundaries are drawn, were there townships within the area of the city of Chicago, were it villages, were it like some other place, it certainly would have split a lot of those, too.

* * *

Supreme Court, U.S.
FILED
OCT 11 1996

(4)

No. 96-146

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES R. KING, APPELLANT

v.

STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO VACATE AND REMAND

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26 pp



QUESTION PRESENTED

Whether the district court correctly held that District Four in Illinois' congressional redistricting plan does not violate the Equal Protection Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-146

JAMES R. KING, APPELLANT

v.

STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO VACATE AND REMAND

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court be vacated and the case remanded for further proceedings in light of this Court's decisions in *Bush* v. *Vera*, 116 S. Ct. 1941 (1996), and *Shaw* v. *Hunt*, 116 S. Ct. 1894 (1996).

OPINION BELOW

The opinion of the district court (J.S. App. 5-71) is unreported.

JURISDICTION

The judgment of the district court was entered on March 13, 1996. A notice of appeal (J.S. App. 1-2) was filed on March 22, 1996. On May 16, 1996, Justice

Stevens extended the time for filing a jurisdictional statement until July 20, 1996 (a Saturday), and the appeal was docketed on July 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

This case involves a constitutional challenge to the configuration of District Four in Illinois's 1991 congressional districting plan. That plan was drawn by a three-judge federal district court after the state legislature failed to redistrict following the 1990 census. *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court). District Four is located in the City of Chicago and parts of suburban Cook County. It contains a 59% Hispanic voting-age majority. The *Hastert* court believed that a district with such a Hispanic voting-age majority was necessary to forestall a violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 and provide Hispanic voters with a meaningful opportunity to elect the candidates of their choice. This appeal involves the subsequent decision of a different three-judge district court (containing two of the three judges who sat on the earlier three-judge court), which upheld the configuration of District Four against constitutional challenge.

1.a. The Elections Clause of the United States Constitution, Art. I, § 4, vests in state legislatures the initial responsibility for drawing congressional districts. In this century, however, the Illinois legislature has rarely exercised that responsibility. See *Colegrove* v. *Green*, 328 U.S. 549 (1946) (litigation arising from Illinois's failure to redistrict between 1901 and 1945). Since this Court's decision in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), which applied the

one-person/one-vote standard to congressional districting, the State's legislature has never enacted a congressional redistricting plan. Illinois's 1961 plan—the last plan formally enacted by the legislature—was declared invalid by the Supreme Court of Illinois in 1965. *People ex rel. Scott* v. *Kerner*, 208 N.E.2d 561, 566 (Ill. 1965). The legislature failed to enact a new plan, and the court was required to draw one instead. *People ex rel. Scott* v. *Kerner*, 211 N.E.2d 736 (Ill. 1965); see *Kirby* v. *Illinois State Electoral Bd.*, 251 F. Supp. 908 (1965) (three-judge court); see also *Scott* v. *Germano*, 381 U.S. 407 (1965) (contemporaneous litigation involving Illinois legislature's failure to draw new state House and Senate districts). The legislature again failed to redistrict following the 1970 and 1980 censuses; in both instances, three-judge federal district courts devised the State's congressional districts. See *In re Illinois Congressional Reapportionment Cases*, No. 81-C-3915 (N.D. Ill. Dec. 3, 1981) (three-judge court), summarily aff'd *sub nom. Ryan* v. *Otto*, 454 U.S. 1130 (1982); *Skolnick* v. *State Electoral Bd.*, 336 F. Supp. 839, 871 (N.D. Ill. 1971) (three-judge court).

b. Following the 1990 census, the Illinois legislature again abdicated its responsibility. The census reported that Illinois's rate of population growth was smaller than that of the United States as a whole; as a result, the State was apportioned only 20 seats in Congress, down from 22 in the previous decade. J.S. App. 20. Under Illinois law, the State's General Assembly was "charged with the obligation of implementing a constitutionally sound congressional redistricting plan by June 30, 1991." *Hastert*, 777 F. Supp. at 638. But the legislature "did not bring any

redistricting proposal to the floor for debate, much less a vote." *Ibid.*

In light of the legislature's failure to act, five sets of plaintiffs filed suit in the United States District Court for the Northern District of Illinois. J.S. App. 21.[1] Pursuant to 28 U.S.C. 2284(a), a three-judge district court was convened to hear those suits, which were consolidated as *Hastert* v. *State Bd. of Elections*. *Hastert*, 777 F. Supp. at 638-639. Each set of plaintiffs sought a declaration that the State's existing congressional districting plan was unconstitutional in light of the 1990 census results; they also sought an order directing the State to hold elections under a court-drawn redistricting map. J.S. App. 21. In addition, the Nieves plaintiffs also contended that demographic and population changes since 1980 now required the drawing of an Hispanic-majority district pursuant to Section 2. *Hastert*, 777 F. Supp. at 638. The court granted the Illinois State Board of Elections leave to participate as a nominal defendant, which would be bound by the judgment but would neither put on a defense to liability nor participate in remedial proceedings. *Id.* at 639.

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[1] Plaintiffs were the Republican members of the State's congressional delegation (the Hastert plaintiffs); a group of Hispanic and African-American residents (the Nieves plaintiffs); a group of voters acting on behalf of the Democratic members of the State's congressional delegation (the Rosebrook plaintiffs); Democratic Representatives Cardiss Collins and Charles Hayes (the Collins plaintiffs); and the Chicago Urban League, acting on behalf of the African-American voters in the State's three majority-black congressional districts. J.S. App. 21. Several other voters and Members of Congress intervened as plaintiffs, as did the Harold Washington Party. *Hastert*, 777 F. Supp. at 639.

Because the State's existing congressional redistricting plan was clearly "unconstitutional and impracticable" following the 1990 census, the only issue before the court was what plan to draw as a remedy. *Hastert*, 777 F. Supp. at 641. In order to prevent a delay in the State's election schedule, the district court streamlined proceedings by limiting each party to presenting a single proposed redistricting plan at trial and limiting trial to two days. *Id.* at 639-640. The parties, in turn, "worked diligently during discovery and the two-day trial to resolve numerous areas of significant disagreement in their competing plans." *Id.* at 640.

c. In particular, all parties agreed "that population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district." *Hastert*, 777 F. Supp. at 640. During the 1980's, the Hispanic population in Chicago and Cook County had grown at a rate substantially greater than the State's overall population growth rate of .0357%. Chicago's Hispanic population had increased by 29.33%, to a total of 545,852. *Id.* at 649. Thus, 19% of Chicago's 1990 population of 2,783,726 was Hispanic. Def.-Int. Exh. 26, at 4. In Cook County taken as a whole, the Hispanic population had grown by 39%, to a total of 694,194. 777 F. Supp. at 649; Def.-Int. Exh. 10.[2]

For the most part, Hispanic persons in Chicago and Cook County lived in one of "two dense enclaves, one on Chicago's near northwest side, and another on the near southwest side." *Hastert*, 777 F. Supp. at 649;

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[2] The ideal population for each of Illinois's 20 congressional districts following the 1990 census was 571,530. *Hastert*, 777 F. Supp. at 641 n.7.

see J.S. App., Att. 1. Those areas are approximately a mile from one another at their closest points, and their residents share significant political, economic, and cultural interests. *Hastert*, 777 F. Supp. at 649; Def.-Int. Exhs. 20-24. Thus, "[t]he separation of the clusters is not indicative of the existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers." *Hastert*, 777 F. Supp. at 649. Taken together, these two areas contained sufficient Hispanic population after the 1990 census to form a voting-age majority in a congressional district. Def.-Int. Exh. 19, at 3. Under the then-existing districting plan, however, Chicago's Hispanic population had largely been divided among two majority-white districts. Def.-Int. Exh. 21, at 3-4. Because "Hispanic voters in Chicago were unlikely to be able to elect a congressional candidate of their choice without drawing a congressional map that included both the north and south Hispanic communities within the same district," Def.-Int. Exh. 29, at 3-4, the *Hastert* parties agreed that it was necessary to draw such a majority-Hispanic district.

The existing districting plan also included three Chicago-area districts with African-American majorities (Districts One, Two, and Seven). See *Hastert*, 777 F. Supp. at 646 n.19. In compliance with Seventh Circuit precedent holding retrogression in minority voting strength to be a violation of Section 2 of the Voting Rights Act, see *Ketchum* v. *Byrne*, 740 F.2d 1398, 1406 (1984), cert. denied, 471 U.S. 1135 (1985), the *Hastert* parties agreed to retain those three majority-black districts. See *Hastert*, 777 F. Supp. at 646-648 &

n.19.[3] Because of population shifts in the intervening decade, the configurations of those districts in the new plan would necessarily differ to some extent from their outlines on the 1981 map. See *id.* at 646 n.19.

Moreover, the final configuration of the three African-American-majority districts would affect the configuration chosen for the Hispanic-majority district, for the large concentrations of Hispanic population in Chicago lay in close geographic proximity to the areas included in the majority-black districts. Def.-Int. Exh. 29. The Seventh District, in particular, had represented an area running from downtown Chicago to the city's west side for two decades. See Def.-Int. Exhs. 18, 40, 41. Since 1981, its borders had extended from Lake Michigan on the east all the way to the suburbs of Oak Park, Maywood, Bellwood, and Broadview on the west. See *ibid.*; *Hastert*, 777 F. Supp. at 648 n.24. As a result, the largely Hispanic areas on the near north and south sides were separated by a portion of the Seventh District that linked downtown Chicago with the west side. See *ibid.*

The participants in the *Hastert* litigation considered several alternative configurations for the four Chicago-area majority-minority districts. See generally Def.-Int. Exhs. 25, 29. In those configurations, the majority-Hispanic district was drawn in one of three general ways. Some alternatives included a north-south Hispanic district that contained the cores of the Hispanic community and was surrounded on its eastern, southern, and western sides by the Seventh District. Def.-Int. Exhs. 25, 29F-29H; see

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[3] The 1990 census reported that 1,317,147 African-American persons lived in Cook County, 1,087,711 of them in the City of Chicago. Def.-Int. Exh. 26 at 5.

also J.S. App., Atts. 2-3. The parties rejected these alternatives, which "violated numerous communities of interest by dividing Chicago's West Side and by creating an additional southwest connector for the Seventh District." Def.-Int. Exh. 29, at 6. At least two alternatives connected the predominantly Hispanic areas by including land along Lake Michigan to their east; under these scenarios, the Seventh District was bordered on its northern, eastern, and southern sides by the majority-Hispanic district. Def.-Int. Exhs. 25, 29B-29C. The parties rejected these alternatives, because one required the creation of two narrow connectors, and the other would "violate one of Chicago's most venerable communities of interest" by dividing the "Bronzeville" area on the City's south side. Def.-Int. Exh. 29, at 4-5.

The parties ultimately decided to propose a plan "that connected the north and south side Hispanic communities through a western connector." Def.-Int. Exh. 29, at 5; see Def.-Int. Exhs. 25, 29D, 29I. Under such a map, the Seventh District would continue to extend from Lake Michigan to the western suburbs, but it would now be bounded to the west by the majority-Hispanic district's western connector. Such a plan would "preserve[] the integrity of major communities of interest on the south and west sides of Chicago and develop[] a connector that included minimal population." Def.-Int. Exh. 29, at 5. And many of the areas included in the connector would "constitute natural boundaries." *Id.* at 6. Although the other alternatives would have created "a more compact Hispanic congressional district, without causing retrogression to the three African-American districts," the participants in *Hastert* agreed to the western connector configuration in order to address

concerns raised by the Seventh District's incumbent "regarding the shape of her district." Def.-Int. Exh. 25, at 4-5.

d. Because of the extensive pretrial negotiations, the *Hastert* trial focused on consideration of two proposed redistricting plans—one offered by the Hastert plaintiffs and the other offered by the Rosebrook plaintiffs. *Hastert*, 777 F. Supp. at 640, 641 & n.8. Both plans incorporated a majority-Hispanic district using a western connector. *Id.* at 648 & nn.22, 24. Both proposals also preserved the First, Second, and Seventh Districts with African-American voting-age majorities, and they did so "in almost identical fashion." *Id.* at 646-647. In an opinion issued on November 6, 1991, the district court ordered the State to hold elections under the plan put forward by the Hastert plaintiffs. *Id.* at 662. The court found that the Hastert plan better satisfied the one-person/one-vote requirement, *id.* at 644-645, that it was "marginally superior to the Rosebrook plan" in affording minority voters an opportunity to elect the candidates of their choice, *id.* at 648, 651, and that it was "likely to produce a fair distribution of congressional seats across party lines." *Id.* at 662.

Under the plan adopted by the court, the Fourth District is 65.03% Hispanic in total population and 59.18% Hispanic in voting-age population (VAP). *Hastert*, 777 F. Supp. at 648 n.22.[4] Over 95% of its total population, and 96.9% of its Hispanic population,

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[4] The First District in the court's plan is 69.33% African-American in total population and 67.49% black in VAP. 777 F. Supp. at 647 n.21. The Second District is 68.04% African-American in total population and 65.61% black in VAP. *Ibid.* The Seventh District is 65.15% African-American in total population and 59.33% black in VAP. *Ibid.*

is located in the two core areas on the near north and south sides; the connector contains 4.3% of the district's total population and 3.1% of its Hispanic population. Def.-Int. Exh. 4, at 6. Although "[t]he Hispanic *Nieves* plaintiffs contend[ed], and all parties agree[d], that § 2 of the Voting Rights Act * * * require[d] the creation of an Hispanic district," the district's "extraordinary configuration" prevented the court from "accept[ing] this conclusion without scrutiny." 777 F. Supp. at 648. Thus, the *Hastert* court conducted its own independent review before determining that the proposed district was necessary to prevent a Section 2 violation. See *id.* at 649-651.

Applying the test set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the court first found that "the Chicago/Cook County Hispanic community is 'sufficiently large and geographically compact' to constitute a single district majority." *Hastert*, 777 F. Supp. at 649 (quoting *Gingles*, 478 U.S. at 50). It also found that "the Chicago/Cook County Hispanic community clearly is politically cohesive" and that "ethnic bloc voting patterns have thwarted the political interests of the Hispanic community." 777 F. Supp. at 650. In making these findings, the court relied on "previous adjudications that found the community politically cohesive" and "[p]revious judicial findings demonstrating a paucity of Hispanic officials in city and state-wide elected political offices." *Ibid.* The court also noted that ecological regression analyses conducted by two expert witnesses had demonstrated significant polarized voting in Chicago along ethnic lines. *Ibid.* Having thus found the three *Gingles* preconditions satisfied, the *Hastert* court went on to find that the failure to draw a district with an Hispanic majority would violate Section 2 under the "totality of

circumstances." *Hastert*, 777 F. Supp. at 650. In this regard, it relied principally on the "judicially recognized history of discrimination, both past and recent, against the Chicago Hispanic community and its attendant impact on effective political participation and representation." *Ibid.*

3. Appellant, James R. King, is a resident of the Fourth District. J.S. App. 6. He filed the instant action in February of 1995. *Ibid.* His complaint alleged that the Fourth District, as adopted by the *Hastert* court, violated the Fourteenth Amendment standards of *Shaw* v. *Reno*, 509 U.S. 630 (1993) (*Shaw I*). J.S. App. 6-7. After a three-judge district court was convened, J.S. App. 11-12, King filed a motion on August 15, 1995, for a preliminary injunction to prevent the State from holding the 1996 congressional elections under the court-ordered plan. The court permitted several parties to intervene as defendants.[5] It then consolidated the hearing on King's motion for preliminary injunction with trial on the merits of the action. J.S. App. 8; see Fed. R. Civ. P. 65(a)(2).

On March 7, 1996, the three-judge court issued a memorandum and order denying King's requests for preliminary and permanent injunctive relief. J.S. App. 5-71. The court first addressed several procedural issues involving the relationship between King's action and the *Hastert* court decree. J.S. App. 8. It recognized that neither the *Hastert* court's findings of fact nor its judgment could have any issue- or

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[5] Intervenors were several parties who had participated in *Hastert* (District One's incumbent Representative Bobby Rush, Al Johnson, Naomi Hernandez, and the Chicago Urban League) and some who had not (Timuel Black, Elvira Carrizales, and the United States). J.S. App. 7 & n.4.

claim-preclusive effect on King, who was not a party to the earlier action. J.S. App. 14. The district court did admit into evidence the *Hastert* court's findings of fact, and it accepted those findings in the absence of a showing of clear error or changed factual circumstances. J.S. App. 15-19. But the court did not limit King to the record developed by the parties in *Hastert*; indeed, the court did not even admit portions of the *Hastert* record as substantive evidence unless the parties in the instant action moved for the admission of a particular exhibit. J.S. App. 19. The district court also determined that the law of the case doctrine prevented it from disturbing the *Hastert* court's legal conclusions absent manifest error or an arguable change in decisional law. J.S. App. 20. Because both *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), and *Shaw I* arguably changed the law, however, the court reviewed *de novo* the *Hastert* court's conclusion "that the district's extraordinary configuration was necessary to 'satisfy constitutional principles.'" J.S. App. 31.

On the merits, the district court held that a court-ordered redistricting plan must be held to at least as stringent a standard as this Court applied in *Miller* to legislatively drawn plans. J.S. App. 39-46. Applying *Miller*'s test, the court held that strict scrutiny was warranted because "the only reasonable conclusion that can be drawn from the shape and demographics of the district is that racial considerations predominated over all other factors in the configuration of the Fourth Congressional District." J.S. App. 50. The court shifted the burden to the State to prove that the district was narrowly tailored to serve a compelling interest. J.S. App. 37-39 & n.36.

The district court found that defendants had carried their burden. The court concluded that drawing a majority-Hispanic district in Cook County was necessary to prevent a violation of Section 2. J.S. App. 58-68. The court held that the Hispanic community "was sufficiently numerous to constitute a majority in a properly drawn district," J.S. App. 62, and therefore that "the *Hastert* court's finding of geographic compactness was appropriate," J.S. App. 64. The court also found that the Chicago Hispanic community was politically cohesive and that the district drawn by the *Hastert* court has "protected the Hispanic community since 1991 from the invidious effects of racial bloc voting that, regrettably, retains its chokehold on the Chicago electorate." J.S. App. 67. The court finally found that the Fourth District, as drawn, was narrowly tailored to the interest in avoiding a Section 2 violation. J.S. App. 68-70. It noted that the *Hastert* court had "subjected the proposed plans to an exacting constitutional review and determined which plan would provide a better, more complete remedy for the Section 2 violation." J.S. App. 69-70. District Four did not contain an unnecessarily large Hispanic population, and its "extraordinary configuration" was necessary to "preserve shared communities of interest and protect the three African-American super-majority districts against impermissible retrogression" that would violate the Voting Rights Act. J.S. App. 70.

ARGUMENT

The district court applied strict scrutiny to District Four and properly found that drawing a majority-Hispanic district in Chicago and Cook County was necessary to prevent a violation of Sec-

tion 2 of the Voting Rights Act. In reaching that conclusion, the district court did not merely reaffirm the *Hastert* court's explicit findings on the Section 2 preconditions and the totality of circumstances. It also engaged in its own analysis of the record and found that the *Hastert* court's determinations had only been confirmed by more recent evidence.

The court also correctly found that District Four properly addressed the Section 2 violation, and that its configuration was necessary to serve that compelling interest while at the same time protecting communities of interest and complying with the Voting Rights Act's requirement to assure African-American voters an equal opportunity to elect the representatives of their choice.

In our view, those conclusions are correct, they are amply supported by the facts of this case, and they are sufficient to establish the constitutionality of District Four. Nonetheless, at the time the district court reached its decision, it did not have the benefit of this Court's decisions in *Bush* v. *Vera*, 116 S. Ct. 1941 (1996), and *Shaw* v. *Hunt*, 116 S. Ct. 1894 (1996) (*Shaw II*), both of which addressed the application of strict scrutiny to districts whose configuration subordinates traditional districting criteria to the use of race. Accordingly, it would be appropriate to remand this case so that the district court may in the first instance address the application of this Court's decisions in *Bush* and *Shaw II* to the facts of this case.

1. Although "[s]trict scrutiny remains, nonetheless, strict," *Bush*, 116 S. Ct. at 1961 (plurality opinion), this Court has rejected "the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097,

2117 (1995). A district will satisfy strict scrutiny where it is narrowly tailored to serve a compelling state interest. See *Bush*, 116 S. Ct. at 1960 (plurality opinion); *Shaw II*, 116 S. Ct. at 1902; *Miller* v. *Johnson*, 115 S. Ct. 2475, 2490 (1995). Here, the district court found that the Fourth District served the compelling interest in avoiding a violation of Section 2. J.S. App. 58-68; see *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring).[6]

a. The inquiry into the existence of a compelling state interest requires a determination of whether there is "a strong basis in evidence for concluding that the *Gingles* factors are present." *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring); see *Shaw II*, 116 S. Ct. at 1903; *Miller*, 115 S. Ct. at 2491. Here, the district court did not find merely a strong basis in evidence. The court found that a majority-Hispanic district was necessary to prevent an actual, proven violation of Section 2. The district court noted that the *Hastert* court had examined each of the three *Gingles* preconditions as well as the totality of the circumstances and found that the failure to draw a district in Cook County with an Hispanic majority would unlawfully dilute Hispanic voting strength. J.S. App. 58-68.

The court did not rely only on the *Hastert* findings, however. It also conducted its own review of the evidence relating to the *Gingles* preconditions. It found that the Hispanic population in the Chicago area was

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[6] Appellant asserts that the district court placed the burden of establishing the lack of a compelling interest on the plaintiff. J.S. 10-11. To the contrary, the court held quite explicitly that "once strict scrutiny is required, the burden shifts to the State defendants to prove that the racially drawn district is justified." J.S. App. 37; see also J.S. App. 37 n.36.

sufficiently large and compact "to constitute a majority in a properly drawn district." J.S. App. 61-62, 64; see also J.S. App. 52 n.48. It also found that Chicago's Hispanic community was politically cohesive, and that appellant's contrary evidence "was mainly anecdotal, often incredible, and wholly insufficient to support the inferences and conclusions King seeks to draw." J.S. App. 62. Finally, the court found that "ecological regression analysis and extreme case performance of forty-one elections held between 1983 and 1995 establish a definite and continuing pattern of white racial-bloc voting against Hispanic candidates." J.S. App. 63. Thus, "the problems of racial bloc voting and exclusion of Hispanics from the powerfully important slating process remain." J.S. App. 63-64.[7] These findings are fully sufficient to establish the *Gingles* preconditions, particularly because the failure to draw a majority-Hispanic district would leave members of the sizeable Hispanic population without a meaningful opportunity to elect the candidate of their choice in a *single* congressional district. See *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658 (1994).

b. Appellant challenges the district court's findings on the first *Gingles* precondition, contending that the Hispanic population in Chicago and Cook County is not geographically compact. He argues that "where the 4th CD is not compact, it is clear error to find that its population is geographically compact." J.S. 29. That is incorrect. "The first *Gingles* condition refers to the compactness of the minority

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[7] See also Def.-Int. Exh. 5 at 14 ("During the 1980's and 1990's in Chicago, Hispanics have not been elected to office in a legislative or judicial district lacking a voting-age majority of Hispanics.").

population, not to the compactness of the contested district." *Bush*, 116 S. Ct. at 1971 (Kennedy, J., concurring); see *Gingles*, 478 U.S. at 50. Cook County's Hispanic population is concentrated in two dense enclaves located a mile from each other at their closest points. The population in those areas is sufficient to form a voting-age majority in a reasonably drawn congressional district. See pp. 5-6, *supra*. The *Gingles* "compactness" test is therefore satisfied.

Appellant nonetheless contends that Hispanics are not sufficiently numerous to constitute a majority of voting-age *citizens* in a congressional district. J.S. 26-28. Appellant points only to the testimony of his own witness, who stated that District Four, as drawn, had an Hispanic citizen voting-age population of no more than 45%. This Court has explicitly reserved the question of "which characteristic of minority populations (*e.g.*, age, citizenship) ought to be the touchstone for proving a dilution claim and devising a sound remedy." *DeGrandy*, 114 S. Ct. at 2656. The district court properly declined to resolve that question here, for appellant did not "establish[] via competent evidence that the Hispanic citizen voting age population falls below fifty percent" in District Four. J.S. App. 61. The court found "simply too many uncertainties surrounding the validity of the data" reported by appellant's witness. J.S. App. 61 n.58.[8] That find-

[8] Citizenship data were not available at the time of redistricting. J.S. App. 61 n.58. Moreover, the Census Bureau reports citizenship data only at the census block group level, not at the smaller census block level at which the district lines were drawn. Thus, appellant's estimate of the Hispanic citizen population in District Four may not properly account for variations in citizenship levels among different blocks. *Ibid.*

ing is not clearly erroneous. Indeed, the 1992 and 1994 congressional election results support the conclusion that Hispanic voters in District Four possess "the potential to elect a representative of [their] choice"—the focus of the first *Gingles* precondition. J.S. App. 58 (quoting *Growe* v. *Emison*, 507 U.S. 25, 40 (1993)); see *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring) (reasonably compact districts containing 44% and 45.6% African-American population demonstrate that African-Americans are sufficiently numerous to satisfy first *Gingles* precondition).

2. Appellant contends that District Four is not narrowly tailored to the interest in complying with Section 2. J.S. 12-18. This Court did not squarely address the standards governing the application of the narrow tailoring inquiry in the context of a Section 2 justification until its decisions in *Shaw II* and *Bush*, both of which were rendered after the district court's decision here. See J.S. App. 68-69 (noting some uncertainty in the narrow tailoring standard to be applied).

In *Shaw II* and *Bush*, this Court established at least two requirements for demonstrating that a district is narrowly tailored to the compelling interest in avoiding a Section 2 violation. First, the district must "substantially address[] the § 2 violation." *Shaw II*, 116 S. Ct. at 1907. Second, "the district

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Appellant's witness's precinct-by-precinct citizenship estimate also generated some anomalies; these anomalies cast further doubt on his data. In 605 precincts, appellant's witness estimated that the Hispanic citizen voting-age population was *larger* than the Hispanic voting-age population. See Tr. 273-274; Def.-Int. Exh. 51. And appellant's citizenship estimate did not take account of increases in the Hispanic citizen population in the Fourth District since 1990 due to naturalization and the amnesty program. J.S. App. 61 n.58.

drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Bush*, 116 S. Ct. at 1961 (plurality opinion).

In our view, the evidence in this case showed that both of those criteria were satisfied. District Four "substantially addresses the § 2 violation" because it includes the core areas of Hispanic population in the City of Chicago; it is the dilution of that Hispanic community's opportunity to elect candidates of its choice that would be the basis for any finding of Section 2 liability. Moreover, District Four's configuration does "not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." The district's configuration is attributable to a combination of "predominantly nonracial, political manipulation," *Bush*, 116 S. Ct. at 1962—the need to "preserve shared communities of interest" and historical configurations in surrounding districts, J.S. App. 70, and the State's independent compelling interest in "remedy[ing] established violations of the Voting Rights Act" with respect to surrounding African-Americans, J.S. App. 70. Compare *Bush*, 116 S. Ct. at 1972 (Kennedy, J., concurring). Insofar as race was used, therefore, it was used no more than reasonably necessary to comply with the dictates of Section 2.

In approaching those issues, see J.S. App. 69-70, however, the district court did not have the benefit of this Court's result and rationale in either *Bush* or *Shaw II*. Accordingly, it would be appropriate to remand this case to the district court so that that court, in the first instance, may apply the teachings of *Bush* and *Shaw II* to the facts of this case. On remand, the district court could, if it deemed it neces-

sary or desirable, take additional evidence regarding the application of the *Bush* and *Shaw II* narrow-tailoring standards to this case.

3. Appellant contends that the district court denied him his "day in court" (J.S. 9) by treating him as bound by the findings in *Hastert*. J.S. 5-11. That is incorrect. The district court explicitly recognized that the *Hastert* findings had no issue- or claim-preclusive effect on appellant. J.S. App. 14. His action therefore was not barred as an "impermissible collateral attack." Cf. *Martin* v. *Wilks*, 490 U.S. 755, 765 (1989).

The district court properly recognized, however, that the *Hastert* proceedings are not irrelevant to appellant's action—indeed, they are of central importance to it. The only action of the State of Illinois challenged by appellant is its implementation of the districting plan ordered into effect by the *Hastert* court. Thus, this "lawsuit is at its very core a challenge to the *Hastert* court's order." J.S. App. 17. In these circumstances, the district court quite correctly admitted into evidence both the *Hastert* court's findings and the record on which those findings were based. To determine whether the *Hastert* court's plan reflected a predominantly racial motivation, and if so whether the Fourth District's configuration was justified by Section 2, it was necessary to consider that court's actual purposes and the evidence before it at the time. See *Shaw II*, 116 S. Ct. at 1902 n.4, 1903; cf. *United States* v. *Virginia*, 116 S. Ct. 2264, 2277 (1996).

But the district court did not limit appellant to the record established in *Hastert*, nor did it treat the *Hastert* court's findings as conclusive. Although the court stated that it would accept the *Hastert* findings

in the absence of a showing of clear error or changed circumstances, appellant does not point to a single finding below that was affected by this standard of review. To the contrary, the district court carefully considered the evidence adduced by appellant and in many cases found it wanting in terms that would disentitle him to relief under any standard.[9] And while the district court stated that the law of the case doctrine provided the appropriate standard for reviewing the *Hastert* court's legal conclusions, it reviewed *de novo* the basic conclusion that District Four was necessary to satisfy constitutional principles because *Shaw I* and *Miller* changed the law. J.S. App. 31.

Appellant points (J.S. 5) to the district court's discussion of the "*Hastert* court's discretion in selecting an appropriate remedy." J.S. App. 69 (citing *United States* v. *Paradise*, 480 U.S. 149, 183-185 (1987)). That discussion did not deprive appellant of anything to which he was legally entitled. Even if appellant had been a party in *Hastert* and had appealed its final judgment, some deference to the district court's remedial discretion would be warranted. See *Paradise*, 480 U.S. at 183-185. The fact that appellant did not participate in the earlier litigation does not mean that the *Hastert* court was any less empowered to exercise its full remedial authority in discharging its "unwelcome obligation" (*Connor* v. *Finch*, 431 U.S. 407, 414

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[9] See J.S. App. 61 (Appellant presented no "competent evidence" on the citizenship issue); J.S. App. 62 (Appellant's evidence on lack of political cohesion "was mainly anecdotal, often incredible, and wholly insufficient to support the inferences and conclusions King seeks to draw"); J.S. App. 62-63 (on racial bloc voting, "[n]either proposition advanced by [Appellant] is supported by recent city-wide election results or meaningful statistical analysis").

(1977))—the drawing of a constitutional districting plan after the state legislature defaulted on its responsibility to do so.

CONCLUSION

The judgment of the district court should be vacated and the case remanded for further proceedings in light of *Shaw* v. *Hunt*, 116 S. Ct. 1894 (1996), and *Bush* v. *Vera*, 116 S. Ct. 1941 (1996).

Respectfully submitted.

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